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CASES
IN
PARLIAMENT
Reſolved and Adjudged,
UPON
Petitions, and Writs of Error.

By Sir *BARTHOLOMEW SHOWER*, Kt.

The Third Edition, Newly Reviſed and carefully Corrected, with many Additional Notes and References, and Two Tables; The Firſt of the Names of the Caſes; And the Second of the Matter under General Heads.

——— *Quidquid ſum Ego, quamvis*
Infra Lucili cenſum ingeniumq; tamen me
Cum Magnis vixiſſe, invita fatebitur uſq;
Invidia ; ———

Horat.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for Henry Lintot. MDCCXL.

PARIS

IN THE

CASE

OF

ENGLAND and ALLIES

against

FRANCE.

TO THE READER.

NO Collection of Caſes adjudged in Parliament having been yet publiſhed, a Preface ſeems Neceſſary to beſpeak the Reception of that which is now preſented to the World.

To commend or excuſe the Collector, will not perhaps be a Method to introduce it moſt to Advantage: What may be ſpoken in Favour of his Diligence or Capacity, will be cenſured Vain; and if any Excuſe be offered for his Inability to have done it better, ſome will be ready to take him at his Word, and think the Performance comes from a careleſs or unskilful Hand.

Whatever the Author is, there needs no Apology to be made for the Nature or Deſign of the Work it ſelf; for the Subject Matter will be Uſeful and entertaining to all Ranks of Engliſhmen, *to whom Books are ſo; that is, to all ſuch as underſtand and love Literature.*

Here is our Municipal Law, and the Reaſon of it, Equity and the Law of Nations interſperſed; here is the Manner of Arguing, and the Language of the Bar briefly toucht; here are the Forms of Proceedings ſometimes mentioned, but then again thoſe Forms are ſuperſeded by the Original and Eternal Rules of Juſtice.

(a) Page 1. *By the Debates and Arguments here reported, (a) you may be acquainted in ſome Meaſure with the Rights of the Peers, and their Incapacity to alien* (b) Page 12. *ſuch their Rights; (b) with the Nature of Slander,* (c) Page 15. *and ſome Rules concerning it; (c) the Courſe of Equity in reſpect of Penalties and Coſts.*

(d) Page 18. *(d) The Law of Average in the Caſe of Partial* (e) Page 20. *Loſſes at Sea; (e) the Circumſtances upon which Relief may be had in Equity againſt hard or unrea-* (f) Page 22. *ſonable Agreements; (f) the Conſtruction of Wills to Charitable Uſes, where the Eſtate intended is greater in Value, than the particular Bequeſts amount* (g) Page 24 *unto; (g) the Power of a Council of State to commit; with Variety of Matter concerning Pleading; and the Plantations belonging to* England; *and the Privileges and Birthrights of the* Engliſh *Subject by the Common Law, and how far that Law extends.*

(h) Page 35. *(h) The Nature of Colleges, Hoſpitals, and other Eleemoſynary Foundations, and the Authority and Power of Viſitors, and the Methods of their Pro-* (i) Page 58. *ceedings; (i) the Court of Chivalry or Honour,*

the Extent and Boundaries of its Juriſdiction, before whom held, and when and in what Caſes a Prohibition lies to it; (a) *the Power of Lords of Copyhold Manors to refuſe Petitions for the Reverſal of Recoveries in their Courts, and the Judgment of Equity upon ſuch Occaſions;* (b) *the Right of Dower, and the Efficacy of a Term attending the Inheritance to prevent its Enjoyment, and the Opinion of Equity thereupon.*

(a) Page 67.

(b) Page 69.

(c) *The Preference of an Outlawry upon meſne Proceſs to a Judgment not extended, and the Practiſe and Reaſon of the Practiſe of the Court of Exchequer in that Caſe;* (d) *the Conſideration which a Court of Equity ought to have of Bonds, Bills or Promiſes made or given upon Condition or Conſideration of promoting and procuring Matches.*

(c) Page 72.

(d) Page 76.

(e) *The Dependency which* Ireland *hath upon* England, *and her Subordination to it, and the Authority of the Houſe of Peers in This, over the Proceedings in the Chancery of that Kingdom;* (f) *the Opinion of Equity upon Conditional Limitations, and what will be a Performance of ſuch Conditions, and to whom the Profits ſhall go during the intermediate Time,* &c.

(e) Page 78.

(f) Page 83.

(g) *The Qualification requiſite in a Preſentee to a Benefice, and the Power of the Ordinary to refuſe for Defect of Knowledge, and how that Defect is to be tried;* (h) *the Conſtruction of Law upon a Deed leading the Uſes of a Fine of the Wife's Land to the Heirs of the Husband's Body,*

(g) Page 88.

(h) Page 104.

(a) Page 108. *the Husband dying afterwards before the Wife*; (a) *the Right of the Half Blood, in the Diſtribution*
(b) Page 111. *of an Inteſtate's Eſtate, and unto what Share*; (b) *the Right of nominating to the Office of Chief Clerk for inrolling of Pleas in* B. R. *and to whom it belongs*;
(c) *Ibid.* (c) *the Nature of a Bill of Exceptions, and the Proceedings thereupon, and in what Caſes the ſame may be refuſed, and if any Authority in the Lords over the Judges in Caſe of ſuch Refuſal.*

(d) Page 127. (d) *The Puniſhment of Treaſon by the* Engliſh *Laws, and the Form of Judgments in that Caſe*;
(e) Page 137. (e) *the Nature of Contingent Limitations after a Fee, and if they may be allowed upon Contingencies to happen at any Time after the Deceaſe of Perſons*
(f) Page 140. *then in Being*; (f) *the Manner of declaring the*
(g) Page 146. *Uſes of a Fine*; *and by what Deed or Writing*; (g) *the Nature of Wills, and of the Revocations of them, and if a Will, whereof the Contents are unknown,*
(h) Page 150. *may revoke a former*; (h) *the Efficacy of the Acts of one that is* Non compos mentis; *and if, and how*
(i) Page 154. *far void*; (i) *what Deeds altering the Eſtate of a Teſtator ſhall revoke a ſolemn Will.*

(k) Page 158. (k) *The Nature of the Office of a Clerk of the Peace, by whom grantable, and for what Intereſt,*
(l) Page 164. *and how removeable*; (l) *the Prerogative of Preſenting to Benefices made void by Promotion, and if ſuch Prerogative be ſerved or fulfilled by a Commendam*; *and whether it can operate upon a new*
(m) Page 186. *created Pariſh or Rectory*; (m) *the formal Reaſon and Eſſence of Treaſon, and wherein it conſiſts,*

and what is neceſſary to be alledged in Indictments for that Offence; (a) *the Right of Tithes for Herbage or Agiſtment of Cattle grazed and fed for Sale, though formerly uſed to the Plough.* (a) Page 192.

(*b*) *The Expoſition of a Will of a Native of* France, *and by what Meaſures a Judgment ought to be made of the Meaning of Phraſes uſed by ſuch Perſons in that Language, upon ſuch an Occaſion*; (*c*) *the Conſtruction of the Word* Share *in a Will concerning the* New-River *Water*; (*d*) *the Force or Validity of a Grant or Aſſignment of Land* (*in which the Grantor had a very long Term*) *to hold from and after the Grantor's Deceaſe*; (*e*) *the Title of Knight, if, and how, Part of the Name, and what Allegations in a Count in a* Quare Impedit *are not needful to be anſwered to, and what may be traverſed, and what Grants of the Crown ſhall be good notwithſtanding ſome, and what Miſrecitals.* (b) Page 194. (c) Page 207. (d) Page 199. (e) Page 212.

Theſe and many other Particulars, worthy of moſt Mens Notice, are here debated; and it may reaſonably be ſuppoſed, that none will be Enemies to the Deſign and Publication, but thoſe who miſlike the ſmall Remainders we have left us, of the Ariſtocratical Part of our Government: The Gentlemen who do ſo, muſt be unacquainted with the Grecian *and* Roman *Story, as well as with our own, or elſe have read it but ſuperficially; for even the moſt perfect of the* Grecian *Common-wealths were ſomewhat Ariſtocratical. That, which may be*

called

called ſuch, is Sparta, *which, though it had ſome Laws we cannot account for, yet during ſeveral Centuries it maintained its own Liberty, and aſſiſted its Neighbours to preſerve theirs.*

And notwithſtanding ſome Men may think the contrary, Democracy was not the only Favourite Model of the Ancient Legiſlators. The wiſe Solon, *who founded that Popular Government of* Athens, *was not ſo fond of his own Frame, as to recommend it to other Places, though he believed that it ſuited beſt with the Infirmities of the People: And even in* Rome, *before She acquired any great Reputation, there was a Senate; under Kings it had one; nor doth it appear that a Senate was adjudged Uſeleſs, when it became and was called a Common-wealth. And as ſoon as the Senate loſt its Authority, a Tyranny was ſet up: This may be called their Ariſtocratical Part; and whoſoever reads the Lives of thoſe* Roman *Worthies,* Cato Uticenſis, &c. *that nobly attempted to defend the Liberties of their Country, will find, That it was for the Upholding the Authority of the Senate, that they conteſted, fought, and died.*

Machiavel *indeed, in his Diſcourſes upon the Decades of* Titus Livius, *has ſtrained almoſt every Thing in Favour of Democracy, and with extream Art and Labour hath Illuſtrated a Popular State, and made* Rome *the Example of it; and yet even in thoſe Diſcourſes, he ſometimes ſhews the Neceſſity of an Ariſtocratical Mixture, to make*

a juſt and regular, and happy and laſting Government.

Nay, Algernoon Sidney *himſelf, that famous Aſſertor of Liberty, doth almoſt every where prefer the Ariſtocracy; and he was confirmed in that Sentiment by the Views he had taken of former and preſent Governments, and by the Knowledge he had of what formerly was our own Conſtitution, till* Henry *the Seventh's Reign: For that Prince (as the Lord* Bacon *rightly obſerves) was rather cunning in relation to his own Times, than a Perſon that had a full Proſpect of what would afterwards be the Conſequence of his Meaſures, or that had a due regard to Poſterity: No Man can wiſh, that the Houſe of Lords ſhould be made Cyphers; if they could once again be made the Natural Balance between the King and People.*

There drop, even from Mr. Sidney's *Pen, Expreſſions enough to prove, that a juſt Compoſition of the three Powers, Monarchical, Ariſtocratical, and Democratical, would have been reckoned even by him an equal Government.*

Such a Mixture even our Government was; and though ſome, perhaps out of mere Ignorance, have diſputed the Democratical, and others the Monarchical Part of our Conſtitution; yet no Body ever to this Day could pretend, that our Barons, thoſe Majores Regni, *had not originally a Share both in the Legiſlature and Adminiſtration within*

this Kingdom: The Fact is not neceſſary to be proved, becauſe 'tis not denied; and the Reaſonableneſs of it is apparent.

There is no Occaſion to Complement them for what their Anceſtors did in procuring of Magna Charta *(which the judicious and indefatigable Antiquary Sir* Henry Spelman *ſaith, was only an Aſcertainment or Recompilement of our Old Laws).*

It would be of Publick Service, to have a juſt State of the true Powers of the Houſe of Lords in their Judicial and Legiſlative Capacities, according to the true Engliſh *Conſtitution; that we might be familiarized to the almoſt antiquated Notions of the Ariſtocratical Part of our Government; and ſo may neither be over-run with the Schemes of Abſolute Monarchy-Men, who would have all Judicial Power, even the Dernier Reſort, lodged in the Crown, or in Delegates appointed by it, and not in the Parliament; nor be crumbled into the Diſorders which muſt follow the Notions of thoſe who aim at a pure Democracy.*

But to write an Exact Diſcourſe upon this Head, would require more Lines than can become a Preface: The Reader therefore muſt not here expect an Account of the Growth and Decays of their Power, and the true Reaſons of Each; and the Regulations or Reſtrictions that will be needful, if they ever happen in any Degree to be reſtored to the Preheminence and Authorities, which they formerly enjoyed among us.

To the READER.

It is enough for the preſent to ſay, That all the Meaſures taken and uſed in the Exerciſe of their Judicature are obſerved without Doors, eſpecially by the Perſons concerned, their Relations and Friends: That the Errors in ſuch Exerciſe (if any) are only to be corrected by themſelves, and no ways proper or fit to be ſuggeſted by any private Perſon, much leſs to be publiſhed in Print.

However, it may be hoped, that theſe Reports may probably convince the young Nobles of this Realm, and all who are imployed in and about their Education, that ſome general Knowledge of the Laws of England, *and ſome Acquaintance with Hiſtory and other Learning, cannot be unworthy the Ambition of every Nobleman's Son, who has any Hopes to ſit as Judge in that Auguſt Aſſembly; where the niceſt of Queſtions, in Caſes of the greateſt Conſequence, and between the greateſt of Subjects, and many Times between the King and his People, do frequently come under Conſideration.*

And theſe Papers may likewiſe remember them, what juſt Liberty of Arguing and Debating hath been allowed to Counſel, and with what Candour and Patience they have been heard, even in the moſt tender Points: As alſo ſhew them what Reſolutions were taken upon thoſe Debates and Arguments, that the Law may be conſiſtent with it ſelf, and remain (as it is) a certain Rule of doing Right.

---- Ornari Res ipſa negat ----

Dominus

TO THE READER

THE

TABLE

OF THE

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DOMINUS REX

AND

Viſcount *PURBECK.*

Peerage Salk. 509.

UPON a Petition, the Queſtion was in the Houſe of Lords, Whether the Dignity of a Viſcount could be ſurrendred to the King by a Fine? And it was argued at the Bar by three Counſel for the Petitioner, and by the Attorney General for the King. It was urged on Behalf of the Petitioner, That a Dignity cannot be ſurrendred to the Crown; and that for theſe Reaſons:

Arguments for the Petitioner, that a Peerage cannot be ſurrendered to the Crown, but may be forfeited, and why.

1. It is a Perſonal Dignity annexed to the Blood, and ſo inſeparable and immoveable, (See *Ratcliff*'s Caſe 3 *Rep. Rutland*'s Caſe 6 *Rep.* 53.) that it cannot be either transferred to any other Perſon, or ſurrendered to the Crown; it can neither move forward nor backward, but only downward to Poſterity; and nothing but a Deficiency or a Corruption of the Blood can hinder the Deſcent, as if the Anceſtor be attainted of Treaſon or Felony, *&c.* For in that Caſe, the Heir conveying no Inheritable Blood cannot make any Claim to that which is annexed to the Inheritable Blood: And beſides, there is a tacit Condition of Forfeiture annexed to thoſe Dignities, by the Breach of which Condition the Dignity is determined; but by the Act of the Party there can be no Determination of it, unleſs there be an Attainder which corrupts the Blood. And he took a Difference between ancient Honours and Dignities which were Feodary and Officiary, (as Earl Marſhal of *England*) which have a Relation to an Office or Land, for ſuch are Transferrable over, and ſuch Dignities as are only Perſonal, Inherent in the Blood, and only ſavour *quaſi* of the Realty, of which no Fine can be levied, as 'tis of an Annuity to a Man and his Heirs, no Fine can be levied.

Honours Feodary and Officiary.

2. A Dignity was neither ſubject to a Condition at the Common Law, nor intailable by the Statute *de Donis*, *&c.* nor barrable by the Statute of Fines: Indeed in *Nevil*'s Caſe, ſomething which ſavours of the contrary Opinion is ſaid; but the Queſtion there was, Whether 'twas forfeitable by Treaſon? And therefore the preſent Queſtion is very foreign to the Matter there debated.

A Dignity not within the Statute *De Donis*, nor Statute of Fines.

A Dignity differs from other Inheritances, being an Honour Perſonal affixed to the Blood, cannot be forfeited by a Non-performance of a Condition, except that tacit Condition in Law, and conſequently cannot be intailed; and tho' the Title of a Viſcount be of a Place, yet it is only Titular, for it is often taken from the Surnames of Families.

The Publick is intereſted in the Peerage.

3. The Title of Viſcount, *&c.* is not ſo much a private Intereſt as a publick Right, for Peers are born Counſellors of State, and one Part of a Senatory Body, and therefore cannot be renounced without the Conſent of all thoſe who have intereſt in it; they cannot, without the Conſent of the whole Body, whereof they are ſo conſiderable Members, cut themſelves off from the Body; and ſo the Objection of *quilibet poteſt Juri ſuo renuntiare* is eaſily anſwered.

'Twas further argued on the ſame ſide, That

Whether a Peerage is governable by the ordinary Rules of Law concerning Inheritances.

1. An Honour goes not according to the Rules of the Common Law, nor is it governable by them, it is not therefore pertinent to argue from thoſe Rules which hold in Caſes of other Inheritances; for a Dignity deſcends to the Half-blood; there is no Coparcenerſhip of it, but the Eldeſt takes the whole; a Fee-ſimple will go to a Noble-man without the word (*Heirs*). 1 *Inſt.* 27. It differs from Eſtates in Land in the Intrinſick Matter, as well as the Manner of the Limitation, becauſe it is given for two Reaſons, for Counſel and Defence; and it is a Civil Intereſt, appointed by the Civil Conſtitution of the Realm, which goes with the Blood, and is inherent in the Blood, inſomuch that it is agreed on all Hands, that it can't be transferred to a Stranger; and till *Nevil's* Caſe, 'twas doubted whether forfeitable for Treaſon; if a Lord die, his Son ſhall be introduced without the Ceremony uſual at the firſt Creation; a Peer's eldeſt Son, and all Minors, ſit behind the Chair of State, to prepare them for the Sitting in the Houſe as Members, and becauſe they have ſome Title to the Honour they are called *Nobiles Nati*, for the firſt time they fetch breath they have Nobility in them: So that he, that Surrenders by Fine, muſt not only extinguiſh his Eſtate in the Honour, but alſo the Nobility of his Blood.

The Peers are intereſted in each other.

2. Every Lord is not only a Lord for himſelf, but alſo hath a Right of Peerage, and is a Peer of the Realm, and therefore a Peer for every one of the Houſe, and therefore hath the Privilege to demand his Writ *Ex debito Juſtitiæ*, and is to be tried by his Peers in Capital Crimes; and that appears farther from a Matter which happened in this Houſe, 16 *Car.* 2. There was an Order mentioning the Biſhops to be Lords of Parliament, not Peers; at which the Lords wondering, ordered a Committee to examine the Reaſon of it; which proves that *Lord* is not ſo high nor inclusive as *Peers*: So that if the Fine have any Operation, it takes

away not only his Right, but alſo the Right of the Houſe of Lords.

3. The Trial of Baron or no Baron upon Iſſue in any Court of Judicature is by the Records of Parliament; but if a Fine may be levied in the *Common Pleas*, the Trial is drawn *ad aliud Examen*, and muſt then be by the Records of that Court. The Clerk of the Parliament always certifies if he be a Baron, becauſe he hath the Record before him; but he cannot certify he is no Baron, becauſe he hath not the Record thereof before him. Peerage how triable.

4. No Fine can be levied of a thing Perſonal, as an Annuity to a Man and his (Heirs,) but a Dignity is a thing Perſonal; and ſo he took notice of the Difference betwixt the Honours of Peerage, which are Perſonal, and the Honours that are Feodary and Officiary, which have Reference to an Office or Land. Things Perſonal do not paſs by Fine. Honours Feodary and Officiary.

5. He did argue *ab inconvenienti*, that this Opinion can be no Inconveniency to the Crown; but the contrary makes Nobility a mere Pageantry, by putting it into the Hands of a weak and angry Father, to diſpoſſeſs an hopeful Son of that which is his Birthright: The Titles of *Eſquire* and *Gentleman* are drowned in the greater Dignity of that of a *Peer*, and when the greater are gone, the other muſt go with it: And then from being a *Nobleman* to day, he and the reſt of his Family muſt be below all Nobility, and be called *Yeoman* or *Goodman Villers* to morrow, which may bring great Confuſion to a Noble Family and all its Relatives; and ſurely this Houſe will not put ſuch a publick Diſreſpect on ſuch a Family, by agreeing to ſo unjuſt an Act of one Man. And that which was moſt relied upon, was a Reſolution of this Houſe in *Stafford*'s Caſe *Anno* 1640. which no Man without Indecency can queſtion; it paſſed not *ſub ſilentio* or *obiter*, but upon Debate; neither could it be any way invalid upon Account of the Times, for it was in the Infancy of that Parliament, and that wherein a Peer's Caſe, who ſits now in this Houſe, was judicially before them; and therefore there is no Reaſon to ſhake that Judgment more than any other Judgment of that Time. My Lord *Coke* in his 4 *Inſt. Chapt.* of *Ireland*, is of Opinion that Honours cannot be extinguiſhed but by Act of Parliament. Then as to the Precedents that have been urged on the other ſide, there are none directly to the Point; for as to *Nevil*'s Caſe, there are very few Caſes cited there aright, and are not to be look'd upon as Law. The Caſe of my Lord of *Northumberland* in 3 & 4 *Phil. & Mar.* was by way of Creation, and ſo was the Caſe of *Dudley*. And *Dugdale* in his Baronage of *England*, *pag.* 270. gives an Account of it; and the reſt of the Precedents are above Two hundred Years old, which paſſed *ſub ſilentio*, and are not to be vouched unleſs they were diſputed. The firſt is *Bigod*'s, who in the Time of *Edw.* 1. ſurrendered the Honour of Earl Marſhal of *England* to the King, who granted it to him in Tail: This Honour is Officiary, and therefore nothing to the Purpoſe; and the Surrender Argumentum ab inconvenienti. Precedents anſwered.

was

was made thro' Fear. *Walſingham* 95. The next is the Earl of *Pembroke*'s Caſe, who in 8 *Edw.* 4. was made Earl in Tail, and by this he had the Grant of the Town of *Haverfordweſt*; the King afterwards inclining to dignify his Son with that Title, procured him to ſurrender by Deed, and beſtowed on him another Title, and gave a greater Eſtate, and an ancienter Honour. Here was an Eſtate Tail ſurrendered by Deed; it might work a kind of Diſcontinuance, but no legal effectual Surrender. And for the Caſe of *Ch. Brandon*, who in the Time of *H.* 8. was created Viſcount *Liſle*, afterwards he ſurrendered that, and got a Dukedom; now no Man ever queſtioned the Efficacy of this Surrender, for he himſelf had no Reaſon to queſtion it, for 'twas to his Advantage; and none other could queſtion it, for he died without Iſſue, and his Honour with him: And ſo in the Caſe of my Lord *Stafford*, he ſurrendered, and got a new Honour. So that it appeared all theſe Caſes were either Honours referring to Offices and Lands, or elſe ſuch as were for the re-granting of greater Dignities, which they had no Reaſon to queſtion, and ſo they paſſed *ſub ſilentio*: But here is not one Precedent that they did ever Surrender to the Prejudice of their Blood, or move themſelves quite out of the Houſe by Fine or Deed. And further, If Precedents be good for the Surrender of an Honour by Fine, why not alſo for Transferring of it to another? for of this we have ſome Precedents, *Daincourt*'s Caſe, 4 *Inſt.* 126. One Branch of the Family ſat in the Houſe by Virtue of a Grant from the other Branch from the Reign of *Ed.* 2. to *Hen.* 6. and the Caſe of the Earldom of *Cheſter*, firſt granted 17 *H.* 3. *n.* 25. and transferred 39 *H.* 3. And there was an Attempt made in the Lord *Fitzwalter*'s Caſe, to make a Baron by transferring of the Dignity; but you will find all theſe Precedents diſallowed: And 'twas ſaid that no Man ever met with any Caſe where any Nobleman by Fine levied, or other Conveyance, became a Yeoman or Ignoble.

Peerage how triable.

'Twas argued by another much to the ſame Effect, That Baronage and Peerage is to be determined by the Records of the Lords Houſe, and if any other way be given, as there muſt be, if a Fine be allow'd to bar, then the old true way is gone: This was not a Fine conditional at the Common Law, and therefore not within the Statute *De donis Conditionalibus*, and an Honour being a Perſonal Dignity is not to be barred (*Jones Rep.* 123.) by Fine, being inherent in the Blood; *&c.* The Duke of *Bedford* was by Authority of Parliament degraded, and that was for Poverty, and by Act of Parliament, and not by Surrender: Therefore Judgment was prayed for the Petitioner.

A Peer was degraded for Poverty.

Argument for the King.

The Attorney General argued *pro Domino Rege* upon theſe Reaſons.

1. There is but a defective Proof of the Creation of this Honour, no Letters Patents, no Records of the Inrollment produced, nor any Entry in any Office of ſuch a Patent, as is uſual; all

that is pretended is, That he ſat in ſome Parliaments afterwards as Viſcount *Purbeck*; but that will not be accepted for Proof; for no Man can be created *Viſcount* but by Letters Patent; a Writ of Summons will be an Evidence of a Creation, but will not amount to a Creation; there is a Ceremony equal almoſt to that of an Earl, there muſt be a Coronet; all which muſt be performed, or he muſt have Letters Patent to diſpenſe with it, which being Matter of Record, muſt be produced. 18 *Hen.* 6. *Beaumont* was the firſt created *Viſcount*, but there was never any ſince, nor then without Letters Patent; for he is to take place of ſome, and therefore he muſt have ſomething to ſhow for his Precedency; but a *Baron* is the loweſt Dignity, and therefore may be created by Writ: Neither can it be preſumed that they were loſt, for except it be produced it makes no Title; except they be produced, it ſhall not be intended there was any; neither can it be help'd by any concurrent Evidence, for if their were (*Page*'s Caſe 5 *Rep.* 53.) a true Creation, there would be ſome Evidence in ſome of the Offices; but there is not in any of them the leaſt *veſtigia* of Proof to ground a Preſumption.

Viſcount created by Letters Patent only.

A Baron may be by Writ.

2. Dignities, as well as other Inheritances, muſt be limited according to the Rules of Law; the Dukedom of *Cornwal* (in 8 *Rep.* 1. the Prince's Caſe) was limited according to the ſtricteſt Rules of Law. And whereas it hath been ſaid that Dignities differ from other Inheritances, that is where there is ſome particular Reaſon for it, as in the Caſe of Tranſmiſſion or Alienation, which depends not upon the Manner of Creation, as ſhall be ſhewn afterwards: And for the Caſe of 1 *Inſt.* 27. which was that an Inheritance of a Dignity may be created by other Words than other Inheritances are, as an Eſtate-Tail without the Words *of his Body*, there's not any ſuch Thing in the Book: 'Tis ſaid indeed, that if the King for Reward of Services done do grant *Armories* to a Man and his Heirs Male, 'tis an Intail of the Coat without ſaying *of his Body*; but I think that will not be taken for the Caſe of a Dignity; the Statute *De donis Conditionalibus* extends to Honours; the Word *terram* would be thought an improper Word to comprehend all Things tailable, yet ſaid to extend to all, and to Honours too, 1 *Inſt.* 20. and if an Honour can't be intailed, then no Remainder can be limited; and yet there be many Lords that ſit in this Houſe by Remainder by good Title. The Statute of 26 *Hen.* 8. 17. ſaith, That if a Man be attainted of Treaſon, he ſhall forfeit his Lands, Tenements, and Hereditaments: Now 'tis adjudged that the Word *Hereditaments* comprehends Honours, which ſhew that they are ſubject to the ſame Rules of Law that govern other Kind of Inheritances, and are comprehended with other Particulars without general Words. This being premiſed, it's a known Maxim in all Laws, *Nihil rationi magis conſentaneum quam rem eodem modo diſſolvi quo conſtituitur*, which Rule is ſo general, that the higheſt Authority, *i.e.* the Parliament, is not exempt from it; for 'tis not poſſible to eſtabliſh any Thing ſo firm by Statute, which cannot by another Statute be

That Dignities muſt be limited according to legal Rules, as other Inheritances.

That Honours may be intailed within the Statute *De donis*.

Hereditaments comprehends Honours.

That a Creation may be deſtroyed, and how, and when.

annulled. Now in the Creation of a Peer there are three Things; the Perſon that creates, the Perſon that is created, the Matter of Record whereby he is created. Now if the King, who is the Perſon that creates, and his Succeſſors, agree with the Perſon that is created Peer and his Succeſſors, the one to undo their Parts, and the other to give away their Parts, and there is a Matter of Record of as high a Nature concurring to effect this Diſſolution, *&c.* in ſome Caſes 'tis in the Power of an Anceſtor, by his own Act, to deſtroy a Patent; as if a *Scire facias* in *Chancery* be brought againſt his Patent, and Matter is ſuggeſted whereby to avoid it, this ſhall (*Bro.* Tit. *Patent*, 37, 97.) vacate whatſoever was created by the Patent, and yet 'tis there in the Power of the Anceſtor, by good Pleading, to have ſupported the Patent, and by bad pleading to deſtroy it; and therefore when the Foundation, which is the Patent, fails, the Honour, and whatever it be that is erected upon it, ſhall fail alſo: Every Eſtate, by the Conſent of all Perſons intereſted and concerned in the Thing, may be taken away; for the Law is ſo ſet againſt Perpetuities, that a Clauſe intimating it is void, and tho' an Honour is not (*Jones*'s *Rep.* 109, 123.) aſſignable, yet it may be extinguiſhed. It's true, if a Man hath but a Part of an Eſtate, as only an Eſtate for Life, he can't alone paſs away the whole Eſtate, but none who hath the Inheritance in Tail or in Fee, but he may deſtroy the whole, and tho' any one have but Part, yet by the Concurrence of all that are concerned the Whole may be deſtroyed: It is admitted if he commit Treaſon, and is attainted thereof, he loſeth the Honour for himſelf and his Poſterity; now 'twas in his Power to do this Act overt; and if by an Act unlawful he hath Power to defeat the Deſcent of the Intail upon his Iſſue, there is the ſame Reaſon that by a lawful Act he ſhould part with it; there are two Acts of Parliament in force which fortify the Fine; it muſt be granted that thoſe Honours are within the Statute *de donis*, and then there can be no Reaſon they ſhould not be within the Statutes of Fines, 4 *Hen.* 7. & 34 *H.* 8. which ſay that Tenant in Tail may levy a Fine of all Things that are intailable within the Statute *de donis*; whatever therefore is within the one is within both; and it is not ſufficient to alledge that it is inconvenient that it ſhould be within the Statute of Fines; for there is an Act of Parliament, and without an Act of Parliament to exempt it, it can't be exempted: It may be proved by great Variety of Precedents to have been the Practiſe in former Times, anciently nothing more frequent than to releaſe Honours. See *Selden*'s *Titles of Honours* 730. it was as frequent as to grant them: In later Times (*Delaval*'s Caſe, 11 *Rep.* 1.) it hath been the Judgment of the Lords that Honours may be extinguiſhed, which in 1668. was certified by all the King's Counſel Learned in the Law to be good Authority. But to go a little higher, *Andrew Giffard* Baron *Pomfret* in Fee, 4 *Hen.* 3. *Rot.* 100. ſurrendered to the King; ſo 23 *Hen.* 3. *Simon Mountford*, Eſq; Earl of *Leiceſter*, having a Mind to take an Honour from his eldeſt Son, and confer it upon his younger, and ſo it was ſurrendered and regranted

That whatever is within the Statute *de donis* is within the Statute of Fines.

That an Honour may be releaſed and extinguiſhed.

Precedents.

accordingly. *Selden* ſeems to conſtrue this to be by way of Tranſmiſſion, and not Surrender; yet others of later Authority (as *Camden's Britan.* Title *Earl of Leiceſter*) ſay expreſly that he did Surrender it; and *Selden* himſelf ſays it was by Concurrence of the King: King *Hen.* 3. (*Rot. Cr.* 24. *men. E.* 1.) created one Earl of *Richmond*, and he ſurrendered to the King (*Camden's Brit.* Title *Earl of Richmond.*) *Roger de Bigod* ſurrendered not only the Office of Earl Marſhal, but alſo the Earldom of *Norfolk*. *William* Duke of *Juliers*, whoſe Father came in with *Edw.* 3. was created Earl of *Cambridge* (40 *Edw.* 3. *m.* 21.) in Fee, his Son ſurrenders to the King, which Record we have here: So *Edward* the Third made his Son *John* of *Gaunt* (See *Camden ubi ſupra*) Earl of *Richmond*, who ſurrendered it to the King. And laſtly, in the Years 1639, 1679. *Roger Stafford*, whom the King intended to make a Viſcount, by the Advice of the Learned Men levied a Fine thereof, by which 'tis now enjoyed. Laſtly, he argued *ab inconvenienti*, for no Lord in the Houſe will be in Safety if it ſhould be otherways, there being many ſitting in this Houſe by Virtue of Surrenders from other Lords in former Days, and perhaps ſome of their Heirs are alive; and ſo if theſe Surrenders be adjudged invalid, it would ſhake their Lordſhips own Poſſeſſions, and make it dubitable, whether Foreigners and Perſons unknown may not come and thruſt them out; but if not ſo, it may cauſe Confuſion amongſt themſelves, their former Honours having been ſurrendered to accept of others; and perhaps ſome, not thinking their Title ſecure, will ſtick to the former, and ſo occaſion Diſpute and Confuſion about Precedency. And laſtly, it will put a great Diſgrace upon your Anceſtors Proceedings, who deemed this Courſe legal; and thoſe muſt ſhew very good Precedents that it hath been diſavowed, if they will encounter ſuch conſtant Practiſes.

Argumentum ab inconveni-enti.

In the next place it was anſwered to their Arguments and Objections; and as for that firſt Argument, That an Honour is inherent in the Blood, he anſwered, That this Inherency in the Blood is not eſſential to Honours, for an Honour may be created for Life, and then none of the Poſterity or Blood of the Peer is thereby ennobled: It may be limited to the Heirs Male of the Body, ſo that an Honour may touch and enter far into the Blood, and yet not run with it; and farther, it may be limited to the Heirs by ſuch a Wife, there the Iſſue by the ſecond Venter ſhall never inherit the Dignity, and yet is as near to the Father, as thoſe that are by the firſt, ſo that 'tis no true Ground that they go upon, that Nobility is inherent in the Blood. And for what was alledged as to the Inconveniency of Surrendering Dignities, he anſwered, That there may be neceſſary Reaſons for the Extinguiſhment of an Honour, and it may be for the Benefit and Advantage of the Party and his Poſterity; as if it do happen that the Family do fall into Poverty, and be not able to ſupport the Honour of Peerage with Decency, and ſo this Honour would perhaps be a Diſgrace to the reſt of the Lords; and in a Child's Caſe, it may happen to a Noble Family to have thoſe Afflictions, that to continue the Honour would expoſe the Family

Anſwer to Objections. 1. Whether Honour inherent in the Blood.

2. If Surrendering inconvenient.

Family to Infamy; and therefore ſometimes, to prevent the Son of Adultery from his ſucceeding to the Dignity, it may be convenient to ſurrender it; and yet this cannot be without the Concurrence of the Prince, who being the Source of Honour can beſt judge of the Reaſons for ſtopping the Stream; and it cannot ſeem an harder Caſe to diſinherit him of the Honour than of the Eſtate, which he may do; and if he leave his Honour without his Eſtate, it will be a Burden on his Shoulders which he will be unable to bear; and ſeeing it's neceſſary that there be a Concurrence of the Prince, it is indecent to ſuppoſe ſo vile a Thing of the Crown, as to comply with the Peeviſhneſs and Simplicity of the Parents, where there is no Reaſon for it. And as for what hath been alledged for the Invalidity of thoſe Precedents, that they were in Caſes of New Creations, and were in nature of Tranſmiſſions, he anſwered, That when an Honour is ſurrendered, and a new Honour granted, the former is either extinguiſhed, or not, before the other takes Effect; if not, then the Party hath both together againſt the Will of the Donor; and perhaps the new Honour may be of that Name and Place, and thoſe Perſons may be concerned in it, that will not permit it to be effected; and if it be in the Power of the Anceſtor, for the Advantage of his Poſterity, by the Surrender of one Honour to take a greater, it may be alſo in his Power to do it for his Prejudice. As to the Objection, That by the ſame Reaſon an Honour may be extinguiſhed it may alſo be Transferred; he anſwered, That there was a great Diſparity betwixt them; for as to Alienations of Honours, there's great Reaſon they ſhould be diſallowed, for they all flow from the Prince, and therefore 'tis not fit they ſhould be conferred on any but by the Prince; tho' the King's of *England* have granted Power to a General to give the Honour of Knighthood, *&c.* in the Field, for the Reward and Incouragement of Valour; yet this Granting of Nobility is a Prerogative peculiar to the King's Perſonal one; no Man elſe can enable another: Time was indeed, when the Earls of *Cheſter*, having Counties Palatine, by Virtue of their *Jura Regalia* did create Barons, yet they never ſat in Parliament as Peers, becauſe Peerage being a Thing of ſo high a Nature cannot be given by any but a Sovereign, and is given as a Truſt and Obligation, ſo that common Reaſon ſaith they are not transferrable. It is ſaid in our Law, that where Offices are granted to a Man in Fee, (See *Jones* 122, 123.) he may grant it over; yet in ſome Caſes they are ſo near to the Crown, that they cannot be transferred, but muſt deſcend with the Blood: Upon the ſame Reaſon no Man can ever transfer an Honour, for the near Relation which it hath to the Crown: But in caſe of Extinguiſhment that Relation and Truſt ceaſeth, and ſo they are different Caſes. Then laſtly, as to the great Objection of the Judgment of the Houſe of Lords in *Roger Stafford*'s Caſe *Anno* 1640. he anſwered, That notwithſtanding that Caſe, their Lordſhips had given him Leave to argue it, and therefore they intended not that ſhould be any Impediment. 2. That is no Judgment; for they being a Court of Judicature, do as other

3. Precedents of Surrenders ſupported.

4. Concerning the transferring an Honour.

Peerage conferr'd by the King only.

Anſwer to Lord *Stafford*'s Caſe.

Judges, judge of the Matter before them only. Then the Queſtion was, Whether an Honour could deſcend to the half Blood? They referred it to the Judges, who were of Opinion that it ſhould. Thereupon ariſeth another Queſtion, Whether a Man might Convey or Transfer his Honour to another? 'Twas reſolved he might not. This drew another Queſtion; whereupon they reſolved that a Lord could not Surrender his Dignity; the Original Cauſe was about a Deſcent to the half Blood, the Reſolution is he cannot Surrender; how then can they pretend that to be a Judgment, when the Queſtion in Point of Judgment was not before them. Suppoſe it had been reſolved (and it's a Wonder it had not all that Time) that a Lord could not forfeit; and that had been a third ſtep to have made it a perfect Buſineſs; for conſidering the Times, it had been a moſt convenient Reſolution: But beſides all that, the King's Counſel were never heard in the Point, and the Rejecting the Opinions of Learned Men, ſhews it was no Reſolution of the whole Houſe, tho' entred upon the Journal; and therefore he prayed Judgment againſt the Petitioner.

An Honour may deſcend to the half Blood; but not Transferrable.

The Earl of *Shafsbury* ſpoke in the Houſe for the Petitioner.

Earl of *Shaftsbury*'s Argument.

The Streſs of the Argument for the King in this Caſe is founded upon theſe two Aſſertions.

1. That Honours are taken to be within the Statute *de donis*, *&c.* and the general Rules of that Statute.

2. And then ſecondly, That Honours are to be governed as other Inheritances, by the Rule of the Common Law.

As for the firſt, it hath not been proved; for the Reſolution in *Nevil*'s Caſe 2 *Jac.* was Extrajudicial, and no Judgment of any Cauſe before them; and in ſuch Caſes the Judges do not hold themſelves to be upon Oath; and if there be two or more of another Opinion, they do not refuſe to ſign the Reſolution of the major Part, and ſo it goes under the Denomination of all the Judges; but if it were a Judgment of them altogether, they could neither alter nor make new the Law, neither could they make that intended within the Statute *de donis*, *&c.* which was not in Being till many Ages after; *Beauchamp* in *Richard* the Second's time being the firſt Honour that was entailed by Patent.

Extrajudicial Reſolutions of the Judges are of weak Authority.

When the firſt Honour entailed by Patent.

2. The ſecond Aſſertion is contrary to the Opinion of the moſt Learned Men, the Honour and Dignity of the Houſe, the conſtant Practiſe of *Weſtminſter-hall*, and the direct Evidence of the Thing it ſelf. Juſtice *Berkley*, a very learned Judge, declared his Opinion *Febr.* 6. 1640. as appears by the Records of this Houſe, That Honours deſcend from the firſt that was ſeized of them, contrary to the Rules of other Inheritances; and that Honours are not governed by the Rules of the Common Law. Juſtice *Dodderidge*, in *Jones* 207. is of Opinion, That Honours are Perſonal Dignities which are affixed to the Blood; the Lords never yet ſuffered their Honours to be tried at any Court at Law, or any other where, ſave before themſelves, tho' their other Inheritances are tried there

That Honours are not governed by the Rules of Common Law;

Are Perſonal Dignities;

Triable only by the Lords.

as well as other Mens: So *poſſeſſio fratris* holds of Lands, but not of a Dignity, which is not diſpoſed of as other Inheritances, nor will it be guided by the ſtrict Rules of Law. The Lord *Coke* is of Opinion in *Bedford*'s Caſe, That an Honour could not be taken away but by Act of Parliament; therefore it will be allowed that the Concurrence of all Parties concerned may extinguiſh this as well other Inheritances, but the Concurrence of all cannot be without Act of Parliament; for the whole Kingdom have an Intereſt in the Peerage of every Lord: It is a dangerous Doctrine to ſay our Judicature and Legiſlature is our own only. The Houſe of Lords is the next Thing to the Crown, tho' that be far above them; yet thoſe that reach at that muſt take them out of the way firſt; they were voted uſeleſs and dangerous before the Crown was laid aſide; and as in Deſcent of the Crown the whole Kingdom hath ſuch an Intereſt in it, as the King cannot Surrender or alien it; ſo in a proportionable Degree, tho' far leſs, the King and Kingdom have an Intereſt in their Lordſhips, and Dignities, and Titles. It is true they may be forfeited, but it doth not follow that they may be extinguiſhed by Surrender. There be two Reaſons for the Forfeiture:

Can be taken away only by Act of Parliament.

The whole Kingdom has an Intereſt in every Peer.

The King cannot Surrender or alien his Crown.

Honours may be forfeited, and why.

1. There is a Condition in Law, that they ſhall be true and loyal to the Government.

2. Honours are inherent in the Blood, and when that his corrupted, that which is inherent is taken away; but in Caſe of a Surrender theſe Reaſons do not hold; there is no Breach of any Condition in Law, nor any Corruption of the Blood; for theſe Reaſons Felony without Clergy forfeits Honours; whereas other Inheritances, tho' Fee-ſimple, are loſt but for a Year and a Day, and ſo are Freeholds for Lives; which is another clear Inſtance that Honours are not governed by the Rules of Law. It is preſſed as a known Law, that Honours are grantable for Lives; a Point of greater Conſequence than the Thing in Debate: It's not a fair way of arguing, nor to be allowed of. As for the Precedents that are, *Selden* 730. is expreſly againſt them; for it ſaith that the Honours of Baronages were in Abbots only in Right of their Abbies, not inherent in them: So that 'tis plainly inferred that other Honours are Perſonal Dignities. The Lord *Delaware*'s Caſe 11 *Rep.* makes nothing for them; for it doth not follow, that becauſe he could not Surrender that which was not in him, therefore he might Surrender that which was in him. As to the other Precedents, he gave theſe three Reaſons:

The Reaſons do not hold in a Surrender.

Precedents anſwered.

1. They were bare Surrenders, no Fines.

2. All thoſe were made by Perſons that had Advantage by them, having greater Honours granted unto them; or ſuch whoſe Intereſt was beyond the Seas, and therefore were willing to quit their Dependencies here upon good Conſiderations that pleaſed them: *Et volenti non fit Injuria.*

Surrenders for the Benefit of the Family.

3. All theſe Surrenders paſſed *ſub ſilentio*, and never admitted of any Diſpute: But as for the ſole melancholy Precedent of *Roger Stafford* 1638. which was condemned in Parliament 1640. 'tis to be

Paſſed *ſub ſilentio.*

obſerved that Reſolution can't be condemned becauſe of the Times; for the Affront to the Lords, in taking ſuch a Fine, was in 1638. and when could it be more properly remedied than in 1640. except it be expected there were a Prophetical Spirit of Judgment againſt a Thing not in Being; there were 94 Lords, preſent; and the Vote was *Nemine Contradicente*, which gives it as great an Authority as any Reſolution that ever was. The King's Counſel were not heard in the Caſe of Ship-money, nor Knighthood-money, where they had more Right to claim to be heard than in this Caſe. To conclude; a Fine is a Judgment in the *Common Pleas*, and your Lordſhips Honours are not triable in that Court below in *Weſtminſter-hall*; but if this Fine be allowable, they muſt be triable there as well as other Inheritances. And as to what has been ſaid, That ſome of your Lordſhips ſit here by Remainders, and they are in Danger, if Honours be not allowed to be intailed, it's denied; and if they be intailed, it's not of the ſame nature with other Inheritances; neither doth any Lord ſit here by Title of a Remainder, but by Virtue of a new Grant in the ſame Patent.

Lord *Staffford's* Caſe ſupported.

'Twas afterwards declared, That the Lords Spiritual and Temporal in Parliament aſſembled, upon a very long Debate, and having heard his Majeſty's Attorney General, are unanimouſly of Opinion, and do reſolve and adjudge, that no Fine levied, or at any Time hereafter to be levied to the King, can bar a Peer's Title of Honour, or the Right of any Perſon claiming ſuch Title under him that levied, or ſhall levy ſuch Fine.

Judgment that an Honour cannot be barred by Fine.

Duvall

Duvall verſus *Price.*

Slander. WRIT of Error on a Judgment in the Court of *Exchequer* affirmed on a Writ of Error before the Keeper of the Great Seal, *&c.* in an Action of the Caſe for Slander: The Writ was to this Effect, *Gullelmus & Maria, &c. Theſ. & Baronibus de Scaccario ſuo ſalutem, Quia in recordo & proceſſu ac etiam in redditione judicij loquelæ quæ fuit in Cur' noſtra de Scaccar' coram Baronibus noſtris præd' de Scaccar' noſtro præd' per Billam inter* Edward' Price *Arm' debitor' noſtr' &* Johan' Duvall *Arm' de quadam tranſgreſſion' ſuper caſum eidem* Edwardo *per præfat'* Johannem *illat' ſuper quo judicium in Curia noſtra de Scaccar' reddit' fuit pro præfat'* Edwardo *verſus dict'* Johann' *quæ quidem record' & proceſſ' cauſa Erroris intervenient' in Camera Concilij juxta Scaccar' vocat'* le Councel Chamber *coram Domino Cuſtod' Magni Sigilli* Angliæ *& vobis præfat' Theſ. venire fecimus & jud' inde verſus præfat'* Johann' *coram, &c. affirmatum eſt, & quia in affirmatione judicij præd' verſus præd'* Johannem *coram, &c. Error intervenit manifeſtus ad grave dampn' ipſius* Johannis *ſicut ex querela ſua accepimus, quos Error' ſi quis fuerit modo debito Corrigi & eidem* Johanni *plenam & celerem juſtitiam fieri volentes in hac parte, vobis Mandamus quod ſi judicium coram præfat', &c. affirmatum eſt, tunc record' & proceſſ' tam judicii quam affirmation' præd' cum omnibus ea tangentibus quæ coram vobis jam reſident ut dicitur nobis in Parliament' noſtro, viz.* 17 *die* Septembris *prox' futur' diſtincte & aperte mittatis & hoc Breve, ut inſpectis record' & proceſſu prædict' ulterius inde de aſſenſu Dominor' Spiritualium & Temporalium in eodem Parliamento Exiſtent' pro' Errore illo Corrigend' fieri faciamus quod de jure & ſecundum legem & conſuetudinem Regni noſtri* Angliæ *fuerit faciend' Teſte nobis ipſis apud* Weſtm' 8 Maii *Anno 6.*

The Writ of Error.

The Record certified. *Record' & Proceſſ' de quibus in Brevi de Errore huic Schedulæ annex' ſpecificat' fit mentio ſequitur in hæc verba, Placita coram Baron' de Scaccar' &c.* Midd' *Memorand' quod alias ſcilicet, &c.* And by the Bill, *Price* complains of *Duvall præſent' hic in Cur' eodem die de placito tranſgr' ſuper caſum pro eo,* viz. *quod cum* he was a good Subject, and free from all Suſpicion of Treaſon, and was a Juſtice of Peace in *Radnor* and *Montgomery-ſhire*, and well performed his Duty, and well affected to the King and Queen's Government, and ready to oppoſe all their Enemies, *&c.* the Defendant maliciouſly deſigning to prejudice the Plaintiff, and to bring him into the Diſpleaſure of his Prince, *&c.* did *tali die & anno apud* Weſtm' *in Com'* Midd', *habens colloquium* of the ſaid Plaintiff, ſay theſe *Engliſh* Words of him, *He* (meaning the Plaintiff) *is diſaffected to the Government*, (the Government of the King and Queen meaning) and having other Diſcourſe of the Plaintiff, and of the Government of the King and Queen, did ſay of the ſaid Plaintiff theſe other Words, *viz. He* (meaning the Plaintiff) *is*

The Inducement.

The Words.

diſaffected to the Government, (the ſaid Government of the King and Queen meaning) by Pretext of which ſaid Words he was Injured in his Credit, and fell into the Diſpleaſure of their Majeſties; and his Office aforeſaid, by Reaſon thereof, did totally loſe, and remained hitherto daily in Danger of a ſevere Proſecution as an Enemy to the King, *&c. ad damp' mill' librar'*, *quo minus* He can ſatisfy the King and Queen the Debts he owes them: *Et inde producit ſect' &c. pleg' &c.* Damage laid 1000 *l.*

The Defendant pleads *Non cul.* Jury find *pro querent'*, and aſſeſs Damages 200 *l.* and Judgment accordingly; *poſteaque ſcil.* 6 Julij *Anno* 5. *iidem Dominus Rex & Domina Regina Mand' hic Breve de Errore Corrigend' ſub Magno Sigillo* Angliæ *Theſ. & Baron' de Scaccar' ſuo direct' in hæc verba*, directed *Theſ. & Baronibus ſuis de Scaccar' ſuo, Quia in recordo & proceſſu, &c. Error intervenit manifeſtus ad grave damp', &c. ſicut ex querela ſua accepimus, ac cum in* 31 Edw. 3. *inter cætera concordat' & ſtabilit' fuit, quod in omnibus caſibus Regem aut al' perſonas tangent' ubi quis queritur de Errore facto in Scaccario Cancellar' & Theſ. Venire fac' coram eis in aliquam Cameram Concilij juxta Scaccar' record' & proceſs' hujuſmodi extra dict' Scacc' & aſſumptis ſibi juſtic' & al' peritis tal' qual' ſibi videbitur fore aſſumend' vocari fac' coram eis Barones de Scaccar' præd' ad audiend' Informationes ſuas & cauſas judicior' ſuor' & ſuper hoc negotium hujuſmodi debite facer' Examinari, Et ſi quis Error invent' fuer' illum corrigend' & rotulos Emendari, ac poſtea eos in dictum Scaccar' ad Execution' inde faciend' remitti fac' ſicut pertinet, prout in eodem Statuto plen' Continet' Nos igitur volentes errorem ſi quis fu'it juxta formam Statuti præd' corrigi & partibus præd' plenam, &c. Vobis mandamus quod ſi judicium inde reddit' ſit, hinc record' & proceſs' præd' cum omnibus ea tangentibus coram Domino Cuſtod' Magni Sigilli* Angliæ *& vobis præfat' Theſ. in Camera Concilij juxta Scaccar' præd' vocat'* le Councel Chamber *die Martis*, viz. 31 Octobris *prox' futur' Venire fac' ut idem Dominus Cuſtos Magni Sigilli* Angliæ, *& vos præfat' Theſaur' Viſis & Examinatis, &c. ulterius in hac parte de Concilio Juſticiar' & al' peritor' hujuſmodi Fieri fac' quod de jure & ſecund' formam Statut' præd' fuit faciend' Teſt' nobis ipſis apud* W. *&c.* Jury gave 200 *l.* Judgment accordingly. Writ of Error below. By Stat. 31 E. 3.

Ad quem diem Martis, *viz.* 31 *die* Octobris *coram* Johanne Somers *Mil' Domino Cuſtode Magni Sigilli* Angliæ (*nullo Theſaur' adtunc Exiſtent'*) *hic ſcil. in Camera Concilij apud* Weſtm' *præd' venit præd'* Johannes Duvall *per* S. A. *Attorn' ſuum. Et præd' Theſaur' & Barones record' & proceſs' præd' cum omnibus ea tangentibus tunc hic Venire faciunt, Et ſuper hoc* the ſaid *J. Duvall* aſſigns the General Error, and the ſaid *Price* pleads *In nullo eſt Erratum*; and after ſeveral *Curia adviſare's*, and Days given, *ſuper hoc viſis & intellectis omnibus & ſingulis præmiſſis per præfat' Dominum Cuſtodem Magni Sigilli præd' (nullo Theſaur' adtunc Exiſtent') maturaque deliberatione inde habita aſſumptis ſibi* J. Holt *Mil' Capital' Juſticiar' &c. &* G. Treby *Mil' &c. Vocatiſque coram eo Baronibus de Scaccar' præd' auditiſque rationibus Baronum præd' Viſum eſt præfat' Cuſtodi Magni Sigilli præd' (nullo Theſaur' adtunc Exiſtent')* Proceedings in the Exchequer-Chamber.

Judgment affirmed there.

Exiſtent') de Concilio Juſticiar' præd' quod in Record' aut proceſſu præd' vel redditione jud' præd' in nullo eſt Erratum Ideo conſideratum eſt per præd' Cuſtodem Magni Sigilli Angliæ (*nullo Theſaur' adtunc Exiſtent') quod judicium præd' in omnibus affirmetur, &c.*

Whether the Words be Actionable. *Argument for the Plaintiff in Error.* General Rule.

Upon the General Error aſſigned here in the Judgment, and Affirmance aforeſaid, the ſingle *Quære* was, If theſe Words, *He is diſaffected to the Government*, be actionable? And it was argued by the Counſel for the Plaintiff in the Writ of Error, that they were not, becauſe they are general and uncertain, do not import any particular Crime which expoſes to any particular Penalty, and they carry no Reference to his Office; and tho' he be alledged to be a Juſtice of the Peace, yet there's no *Colloquium* laid concerning his Office. To make Words actionable, they muſt either tend to the Scandal and Diſcredit of the Party, or ſuch, if true, as muſt bring Damage to the Party, of whom they are ſpoken; otherwiſe, without ſpecial Damage laid and proved, there's no Reaſon for the Jury to give Damages, becauſe he ſuffers none. In ancient Time theſe Actions were rare; the *Year-Books* are little acquainted with them; and tho' later Ages have countenanced them, yet it hath been under certain Rules and Limitations, as that they ought to be particular and clear; for if they are ſo general as to be ambiguous, no Action is warrantable upon them; and therefore they muſt be of a ſingle and known Senſe, and ſuch againſt which no other Intendment can reaſonably be admitted. Slander raiſed by Argument, or Implication, or Inference only, is not enough to maintain an Action: And tho' the *Cauſa dicendi* be not inquirable now, after a Jury hath found them ſpoken as laid, *viz.* maliciouſly; yet if the Words themſelves do not imply Malice and Damage, the Uſe of thoſe Adverbs which are commonly mention'd in ſuch Declarations, will not alter the Caſe; for Men are to be anſwerable only for their own Words, and not for Words expounded or deſcribed in another Manner than the Speaker intended. Here the Word *diſaffected* is none of the plaineſt; nor is the Word *Government* much plainer; the firſt is only a Negative, and to ſay *He is not affected to the Government*, goes only to a want of Zeal, or to an Indifference of Temper, and doth not carry in it any Treaſonable Intent or Purpoſe, much leſs any Act done.

And as to the pretended ſpecial Damage, in the Loſs of his Prince's Favour, or incurring his Diſpleaſure, that is ſuch an Allegation as ſhould not have been made, 'tis neither mannerly nor juſtifiable in the Plaintiff to affirm ſuch a Thing upon Record. And as to the Loſs of his Office, that can be no Damage, the ſame being no Place of Profit, but meerly of Burden and Trouble. 'Twas further urged, That if theſe Words were allowed to be Actionable, *Tory*, *Whig* or *Jacobite*, or any other common rude, uncertain Terms in Diſcourſe, might pretend to it, according to the reſpective Turn of Times, and conſequently no Body would know what Diſcourſe is allowable: As ill Tongues were to be corrected, ſo Care is to be had of Liberty of Speech, not to

make every Thing a Cauſe of Action; and to juſtify this, on the ſame ſide were quoted Multitude of Caſes, too many to deſerve a Remembrance.

Argument for the Defendant in Error.

It was argued on the other ſide, That theſe Words toucht the Perſon in the moſt tender Point, *viz.* his Loyalty; That it carried Scandal in it ſelf, not to be zealouſly affected to the Government, which Protects the whole; that it was equivalent in Common Underſtanding, to the calling him *Traytor* or *Rebel*: That this was much more, than affirming one not to be a *good Man*; that *diſaffected* implied ſomewhat poſitive; it's Meaning was, that the Party hath an Averſion, a fixed, ſettled Enmity to the Government; that this was ſpoken of an Officer of great Truſt; that 'twas a Reflection upon him with regard to his Office, for Loyalty is as neceſſary as Juſtice in ſuch a Poſt; that to ſlander him in the one, ought to be as actionable as to ſlander him in the other; which is allowed it will, becauſe of the Reference to the Office in the nature of the Words, without any Special Damage: That to deny theſe Words to be actionable, would tend to encourage Breaches of the Peace, by provoking Challenges, *&c.* for that, if Men cannot relieve themſelves by Law, they will be tempted to do it of themſelves in other Methods; and that theſe Words were a Reflection on the Government, which imployed Men thus diſaffected; and Abundance of the Common Caſes upon this Subject were quoted, to ſhew what Words would bear an Action in reſpect of Officers and Allegiance: And then 'twas argued ſtrenuouſly, that this was a Special Damage, *viz.* to loſe the Prince's Favour, which every Man ought to covet, and to loſe a Place of Honour and Command, both which the Jury have found.

Reply for Plaintiff in Error.

It was replied on the Behalf of the Plaintiff in the Writ of Error, That as to the Reflection on the Government, it might perhaps warrant an Information or Indictment, but not an Action: That as to Challenges, there was vaſt Variety of Words which are reckoned provocative in the higheſt degree, As the giving the *Lie*, calling a Man a *Coward*, and the like, and yet will bear no Action. And at laſt, upon Debate, the Judgment was Reverſed.

Judgment reverſed.

John Duvall and *Elizabeth* his Wife, Appellants, *verſus William Terrey* of *London* Merchant, Reſpondent.

Court of Equity where not to direct an Iſſue.

Penalty relieved there.

When no Appeal for Coſts.

THE Appeal was to be relieved againſt a Decree in *Chancery*: The Caſe was, That the Appellant *Elizabeth* had entred into a Bond of 140*l.* Penalty, conditioned for the Payment of 72*l.* on the Twentieth of *April* 1676. and by reaſon of ſeveral Promiſes and Delays of Payment, and inſiſting upon Privilege, and other like Occaſions, it was not put in Suit till lately, and then the Appellants were Arreſted: And upon a Declaration,

tion the Appellants pleaded Payment at the Day. And after Iſſue joined, and Notice of Trial, upon ſome Diſcovery of a Defect in the Evidence to prove the Bond, Motion was made in the *King's Bench* to alter the Plea; which denied, a Bill was preferred in *Chancery*, on Suggeſtion that *Elizabeth* had never executed it, or that 'twas obtained by Fraud, and that there was no Conſideration for the ſame; and the Reſpondent preferred a Bill, praying a Diſcovery if ſuch Bond, *&c.* Upon Examination of Witneſſes, and after Publication paſſed, the Cauſe was heard; and upon the Hearing 'twas ordered, That the Appellants ſhould not be relieved, ſave againſt the Penalty of the Bond; and that it be referred to one of the Maſters to compute the Principal Money and Intereſt due thereon, and to tax for the Reſpondent his Coſts both at Law and in that Court; and that what ſhould be found due for the Principal, Intereſt and Coſts, be paid by the Appellants at ſuch Time and Place as the Maſter ſhould appoint, who computed the Principal and Intereſt at 154 *l.* and the Coſts at 67 *l.* and to be paid the Twentieth of *October* following.

Upon the Hearing of this Appeal, there were two *Quæries* made 1. Whether, there being ſome Difference in and about the Proof of the Bond, the Court ought to have made a Decree without directing a Trial at Law upon the Validity of the Bond: But 'twas held, That the Bond not being denied in pleading upon the Iſſue at Law, the *Chancery* had done right, and could not well have directed any other Iſſue than what the Parties themſelves had joined in at Law; and tho' 'twas pretended that the Attorney had pleaded thus without Direction, the Court did not much regard that Pretence, becauſe of the proper Remedy which the Law gives againſt ſuch an Attorney, if the Pretence were true, and therefore they did not much conſider that.

Attorney pleads without Direction. Remedy againſt him

Another *Quære* was, Whether the *Court of Equity* could juſtly award more than the Penalty? And objected, that the Order being to ſave againſt the Penalty, no more ought to have been decreed. But 'twas ſaid, That notwithſtanding that, when the ſame was referred to a Maſter to tax Principal and Intereſt, the Order bound the Party to pay both, tho' it amounted to more than the Penalty; and the Meaning of the firſt Part was only to relieve againſt the Penalty in caſe the Principal and Intereſt came to leſs than the Penal Sum; eſpecially the ſame coming to be heard upon croſs Bills, and as this Caſe was circumſtanced, after ſuch Delay and ſuch Pleading in the Court of *King's Bench*: And as to Coſts, held no Cauſe for an Appeal in this Caſe, nor in Truth was it ever known to be a Cauſe, if the Merits were againſt the Party Appellant. And ſo the Decree was affirmed in the whole.

1 *Ver.* 350.

Coſts no Cauſe of Appeal, if the Merits againſt Appellant. Decree affirmed.

William

William Dolphin and Katharine his Wife, Appellants, verſus *Francis Haynes, Reſpondent.*

Money charged in Equity upon the Perſon who had the Benefit of it.

APPEAL to be relieved againſt a Decree in *Chancery* made by the Maſter of the Rolls, *Nov.* 10. 1696. The Caſe was thus, That one *Paris Slaughter* of *London*, being Guardian to *Katharine* the Appellant during her Infancy, he placed her with his Kinſman *Chambers Slaughter* near *Worceſter*, and ſometimes boarded her in that Place for her Education; and the Reſpondent and the ſaid *P. S.* being Correſpondents, *Paris Slaughter* ordered the Reſpondent to pay the ſaid *Chambers* what Sums ſhould be called for upon the Account of *Katharine:* In purſuance whereof ſeveral Sums were paid upon her Account, and the ſame were allowed again to the Reſpondent by *P. S.* The Appellant *Katharine* having juſt attained her Age, ſhe came to the Reſpondent, and deſired more Money, as by the Order of *P. S.* and accordingly two ſeveral Sums were paid her, and Receipts taken from her, as by the Order of *P. S.* The Appellant *Katharine* did afterwards come to an Account with *P. S.* which was fairly ſtated in Writing, and they executed General Releaſes each to the other: But the ſaid two Sums not being entred in the Books of *P. S.* were not accounted for by the Appellant *Katharine*; and the Reſpondent not having received any Allowance from *P. S.* in his Life-time, nor having, as he thought, any ſufficient Orders to charge the Executor of *P. S.* with, he prefers his Bill againſt the Appellants, and by her Anſwer ſhe own'd the Receipt of the two Sums, but by Order of *P. S.* and afterwards, upon hearing of the Cauſe, The Court declared that there appearing no poſitive Orders from *P. S.* for theſe two Sums, the Appellants ought to pay the Principal, Intereſt and Coſts: And a Decree was made accordingly.

Argument for Appellants.

And now it was argued on the Behalf of the Appellants, That this was not juſt, becauſe the Reſpondent never paid any Money to any Body while *Katharine* boarded with him, or afterwards, but by the Order and upon the Credit of *P. S.* and charged it to his Account; and the Reſpondent did not pretend but that all was repaid him, excepting theſe two Sums; that the Reſpondent and *Katharine* had never any Account or Dealings together upon her Credit; and 'tis to be preſumed, that the Reſpondent hath charged theſe Sums upon the Account of *P. S.* and not to her Account, becauſe the Receipts are ſo worded; and that *Katharine* had releaſed *P. S.* on their accounting together, and therefore ſhe could not charge the Executor of *P. S.*

Argument for Reſpondent.

On the other ſide it was argued, That here was a Badge of Fraud in the Appellant *K.* that upon her Account with *P. S.* no Mention was had of theſe Sums; that the Debt was originally hers; that ſhe was obliged to pay it, either to *Slaughter* or to

Haynes; that not having paid the ſame to *Slaughter*, and *Slaughter* having releaſed to her, ſhe was diſcharged from all Demands on that ſide, and therefore 'twas the more reaſonable it ſhould be anſwered by her to the Reſpondent; that tho' the Credit might be at firſt given to *Slaughter*, yet the Money being paid to her, and not by her paid to *Slaughter*, *Haynes* had a fair Claim againſt her, even to avoid Circuity of Suits; for if this were otherwiſe, 'twould only turn *Haynes* upon the Executor of *Slaughter*, and that Executor upon *Katharine* the Appellant again in Equity to ſet aſide the Releaſe, and to have an Allowance of theſe Sums; and that in Juſtice and Equity the Charge was placed upon the proper Party, who at firſt was the Debtor for what ſhe thus received: And accordingly the Decree was affirmed.

Decree affirmed.

Dormer Sheppard & al' verſus *Joſeph Wright & al'.*

Whether Average be allowable in all Caſes of a partial Loſs at Sea.

APPEAL from a Decree of Diſmiſſion of a Bill preferred in the Court of *Chancery*: The Caſe was thus:

The Appellants did in the Year 1693. load on Board the Ship *Union* at *Gallipoly* 210 Tuns of Oils, of which Ship the Appellants were Owners; and the Reſpondents loaded on Board her at *Meſſina* 85 Bales of Silk, upon Freight by Contract, both to be delivered at *London*. The Ship homeward bound was chaſed into *Malaga Mole* by one of the *Thoulon* Fleet, who were three or four Days in Sight, then ſtood in for that Port, as if they deſigned to attack the Fort; and thereupon the Maſter diſcourſed the Owners Factor, who ſent him off a Lighter to ſave what they could of the Ship's Cargo; and becauſe the Silk was of the greateſt Value, the Silk was put on Board the Lighter, and carried aſhore; and to come at the Silk, (for it lay beyond the Oils) they were forced to rummage the Ship: In ſaving of which, and ſome ſmall Part of the Oils, many Hours were ſpent, and by the Seamen only, and at Night the *French* left the Port, whereupon no more was landed. But about ſix Days afterwards the *French* Fleet appeared again before *Malaga*, and then all Endeavours were uſed to ſave the Oils, but they were prevented by the Boats which the *French* Men of War ſent into the Harbour, and the Enemy forced them to their Guns, and when they could defend the Ship no longer, they bored Holes to ſink her, but the Oils kept her from ſinking, and the *French* took her, and carried her away. The Bales of Silk were afterwards put on board another Ship, and delivered to the Reſpondents at *London*, for which they paid the Freight, *&c.*

The Appellants pretending that they ought to have a Share of the Silk which was ſaved, in Proportion to the Value of the Ship and Oils which were loſt, they exhibited their Bill in *Chancery*, to inforce the Reſpondents to come to an Average with the Appellants for the Loſs of their Ship and Oils. And after Examination of Witneſſes, on the Hearing of the Cauſe, the Bill was diſmiſſed.

And it was argued on the Behalf of the Appellants, That this Diſmiſſion was not juſtifiable by the Rules of Equity; for that it muſt be agreed, If Goods are thrown overboard in Streſs of Weather, or in Danger or juſt Fear of Enemy, in order to ſave the Ship and reſt of the Cargo, that which is ſaved ſhall contribute to a Reparation of that which is loſt, and the Owners ſhall be Contributors in Proportion; and that there was the ſame Reaſon here; that by preferring the Salvage of the Silk (being the beſt of the Cargo) before the Oils, the Owners were deprived of the ſame Opportunity for the Salvage of the Oils; that as the Sea-law in Extremity directs the Maſter to preſerve the beſt of his Cargo, and the Goods ſaved ought to contribute to the Loſs of the Goods Ejected; ſo where one is preferred before the other in caſe of Extremity, there being no Time to land the Whole, Average is juſt and reaſonable. And as to the ſix Days Time, there was then no Apprehenſion of Danger, and conſequently the Maſter could not juſtify the Landing of any Thing after the Reaſon of their Fears were removed. Argument for Appellants.

That the Prudence of their Maſter in ſaving the Silk before the Oils, ought not to be to the Prejudice of the Owners Intereſt, the Oils lying next to be preſerved; that the pretended Neglect of the Maſter, in not landing them during the Abſence of the Enemy, is no Excuſe, becauſe then there was no Danger; that the ſaying that the Loſs of the Ship and Oils did not contribute to the Salvage of the Silks, is no Reaſon, ſeeing the Salvage of the Silk (which had otherwiſe been loſt) deprived the Owners of the ſame Opportunity for the Salvage of the other Goods; that in ſuch Adventures, as the Danger is common, ſo ought the Loſs or Damage to be common and equal; that the Maſter is equally intruſted by and for all; and were it otherwiſe, it had been the Duty, and will be the Intereſt of all Owners of Ships to order their Servants in Extremity to preſerve their own Goods; that the Silk, being of the greateſt Value, it was a National Service, to preſerve that before the Oils, and therefore equitable that all who imbark in the ſame Bottom, ſhould ſhare alike in the Service done for Salvage, *&c.* And further, that if in Extremity, the Safety of the beſt of the Ship's Cargo is not preferable before that of the meaner Value, it will be of ill Conſequence; and therefore the Sea-law provides firſt for the Safety of the beſt of the Cargo, and the Maſter acted accordingly; and that 'tis the Opinion of thoſe who are learned in the Maritime Laws, That where Freighters Goods are equally in Danger, and a like Opportunity for the Salvage thereof, if the Safety of the one be preferred, and the other comes to be loſt,

loſt, ſuch Preference obliges the Goods preſerved to contribute to thoſe which are loſt; it being a General Rule in Cauſes Maritime, That one Man's Intereſt ought not to ſuffer for the Safety of another's.

Argument for the Reſpondents. Average where to hold.

On the other ſide, it was argued with the Decree, That this Pretence was new; that 'twas a Notion unprecedented; that the Rule of Average went only to the Caſes, where the Loſs of one Man's Goods contributed to the Safety of another's, as by Lightning the Veſſel, *&c.* and not to this Caſe; that here each Man was to undergo the Peril of his own Goods; that in Caſe of Damage to Goods within the Veſſel, other Goods were not contributory, but the Owner muſt endure his own Loſs, and had only his Remedy againſt the Maſter, if it were occaſioned by his Defect or Miſcarriage: That the Reaſon of Average was a meritorious Conſideration in the common Caſe, becauſe there the Loſs of one did actually ſave the other; but here was no ſuch Thing: The Loſs of theſe Oils did not ſave the Silk, nor did the Saving of the Silk loſe the Oils; for if the Silk had not been ſaved, the Oils had been loſt, for they were ſo bulky that they could not eaſily be removed without further Time; and if Part only be ſaved, 'tis to the Advantage of the Owner; and where all cannot be ſaved at a Time, the Benefit is accidental to him, whoſe Goods the Maſter's Diſcretion directs to be ſaved: And in this Caſe here was no ſuch Commodity, as could contribute to the Loſs of a Ship, if it had been kept on Board; for the Silk, if on Board, had not aſſiſted to her ſinking. But beſides, here were ſix or eight Days between the Landing of the Silk and the Seizing of the Ship by the *French*, in which Time all the Oils might have been Landed, and thereby both them and the Ship ſaved; and the Apprehenſion of the Danger could not ſo ſoon be removed by loſing Sight of the Enemy in the Morning, and therefore there was no Reaſon for the Maſter immediately to forbear landing his Oils. Therefore 'twas prayed that the Appeal might be diſmiſſed, and the ſame was accordingly done, and the Decree of Diſmiſſion below affirmed.

Decree affirmed.

Whitfield & Ux' & al', Appellants, verſus *Paylor & Ux' & al', Reſpondents.*

What Agreement not relieved in Equity as unreaſonable.

APPEAL from a Decree in *Chancery*: The Caſe was thus: Sir *Lawrence Stoughton*, a young Baronet in *Surrey*, having an Eſtate of near 1000 *l. per Ann.* was a Suitor to the Reſpondent *Mary*, the Daughter of one *Burnaby* a Brewer, reputed to be very Rich. Upon the firſt Propoſal of Marriage, *Burnaby* did agree to give 5000 *l.* certain, and inſiſted to have a Jointure of 500 *l. per An.*

ſettled, and that ſhe ſhould have the Inheritance of the Jointure, if he died without Iſſue. Sir *Lawrence* did refuſe to agree to this; but afterwards he renewed the Treaty himſelf, and accepted of Articles for payment of 5000 *l.* Portion, and made a Settlement of a Jointure of Lands worth 500 *l.* *per Annum*; and likewiſe made another Deed in the Nature of a Mortgage of all his Eſtate, as well the Reverſion of her Jointure as the reſt, for ſecuring the Payment of 5000 *l.* to her in caſe Sir *Lawrence* died without Iſſue; and died within a Fortnight after Marriage, without Iſſue. The Lady *Stoughton* prefers her Bill, and prays the Appellants might be fore-cloſed of the Equity of Redemption on Failure of Payment. The Appellants exhibit their Bill to be relieved againſt this as a Fraud; and upon hearing of theſe Cauſes before the Maſter of the Rolls, the Appellants were decreed to pay the 5000 *l.* by the firſt Day of *Hillary* Term, 1695. without Intereſt, but with Coſts: And in Default, the Eſtate to be ſold to raiſe it with Intereſt from that Day: And upon a re-hearing before the Lord Keeper, his Lordſhip confirmed the Decree, and gave a Twelve-month's further Time for Payment.

Argument for the Appellants.

And now it was argued for the Appellants, That it was proved in the Cauſe, that Sir *Lawrence* was a ſickly weak Man; that on his Death-bed he declared he had made no ſuch Agreement; but that the 5000 *l.* was to pay his Debts, and no Part of it was to return to his Wife, and his Wife preſent, and not contradicting it; that it did not appear, that he had any Counterpart of this Deed, or that he ever adviſed or acquainted any of his own Relations with it; and the Draught of the Deed was confeſſed to be burnt. And further, that the Agreement in its own Nature was unreaſonable, that ſhe ſhould have both Portion and Jointure; and that one was a merit for the other; but that both ſhould be veſted in the ſame Perſon, the Portion returned, and the Jointure enjoyed, was very hard, and therefore to be ſet aſide: That Equity was to relieve againſt ſuch pretended Agreements, as Things done without any Conſideration inducing them, and therefore void.

Argument for the Reſpondents.

On the other ſide 'twas inſiſted on for the Decree, That the Man was of Age; that there were two Treaties of Marriage, which ſhews a Deliberation; that here was no Miſ-repreſentation or Impoſition; the Bargain in it ſelf might be upon good Reaſon, the Gentleman being ſickly; and the Money was to be returned only upon a Contingency of his dying without Iſſue. That in caſe of his having Iſſue, the Agreement was common; that perhaps ſhe had the worſt on't under all Circumſtances. That all Bargains are not to be ſet aſide, becauſe not ſuch as the wiſeſt People would make; but there muſt be Fraud to make void their Acts; and his forgetting that he had done ſuch an Act, when on his Death-bed, is no Reaſon for to annull it; and the Marriage had been a good Conſideration for a Jointure of it ſelf: And reaſonable or unreaſonable is not always the Queſtion in Equity, if each Party was acquainted with the Whole, and meant what they did; much leſs is it ſufficient to ſay that 'twas unreaſonable as it happened in event; for if at the Time

'twas a tolerable Bargain; nay, if at the Time this Bargain was the Meaning of the Parties, and each knew what was done, and neither was deceived, the ſame muſt ſtand: And accordingly the Decree was affirmed.

Decree affirmed.

Thomas Arnold Appellant, verſus *Mr. Attorney General, Matthew Johnſon, Eſq; Thomas Bedford, Gent. Reſpondents.*

Deviſe to charitable Uſes. 2 Vern. 397.

APPEAL from a Decree in *Chancery*: The Caſe was thus: One *Edmund Arnold*, Proctor, being ſeized in Fee of the Manor of *Furthoe* to the yearly Value of 240 *l. per Annum*, and alſo of ſome Perſonal Eſtate; but having no Child or Brother living, made his Will in Writing, and thereby, amongſt other Legacies to many other Perſons, he gave to the Appellant, by the Name of his Kinſman *Thomas Arnold*, the Sum of 40 *s.* all to be paid out of his Perſonal Eſtate; and then proceeds in theſe Words, *Being determined to ſettle for the future, after the Death of me and my Wife, the Manor of* Furthoe, *with all the Lands, Woods, and Appurtenances to charitable Uſes, I deviſe my Manor of* Furthoe, *with the Appurtenances, unto Sir* Lionel Jenkins, *Kt.* William Dyer, Matthew Johnſon, *and* Thomas Bedford, *and to their Heirs and Aſſigns for ever, upon Truſt that they or their Aſſigns, after the Death of him and his Wife, ſhould pay and deliver Yearly for ever, ſeveral particular Sums to charitvble Uſes therein mentioned:* All the Particulars amounting in the Whole to 120 *l. per Annum*, and charged nothing further on the ſaid Manor, but the Expences of the Truſtees in the Execution of the ſaid Truſt. The ſaid *Arnold* ſoon after died; the Wife is alſo ſince dead; Sir *Lionel Jenkins* and *William Dyer* alſo dead.

The Caſe.

Proceedings in Chancery.

In *Trinity* 1692. the Attorney General prefers a Bill againſt the Appellant as Heir at Law, to ſettle and eſtabliſh the ſaid Charities, and to enforce the Truſtees to act or to transfer their truſt Eſtate. To which they anſwer, and the Heir by his Anſwer claimed as Heir at Law, the Surplus of the Charity Eſtate over and above what would ſatisfy the yearly Payments expreſſed in the Will, and the Charges of executing the ſaid Truſt; upon a Reference to a Maſter, to aſcertain the Court of the yearly Value of the Manor, he reports it worth 240 *l. per Annum*, and worth the ſame at the Time of making the Will. And on hearing the Cauſe, the Court declared, That all the Profits of the Premiſſes ought, by the Purport and Intention of the Will, to be applied to the Charities therein mentioned; and that the Appellant *Arnold* the Heir at Law is totally excluded from the Surplus, with Direction how

the Surplus ſhould go in Augmentation of ſome of the Charities; nevertheleſs, in caſe the Appellant ſhould Seal and Execute to the Truſtees a Releaſe and Conveyance of the Premiſſes according to the Decree, then he to have his Coſts out of the Sale of Timber, and that the Truſtees be indemnified.

Argument for the Appellant.

And it was argued on Behalf of the Appellant, That this Decree was not equitable. Some Queſtions were made about the Diſtribution of the Surplus amongſt only ſome of the Charities, and about the Value; but a Surplus was agreed to be in the Caſe; and it was chiefly inſiſted upon, that the Surplus ought to go and be to and for the Uſe of the Heir at Law; for that the Eſtate is not increaſed by any ſubſequent or accidental Improvement, and ſo not like the Caſe of *Thetford* School; but here at the Time of making the ſaid Will was, and now is, of a good Value beyond the Sums given, and was ſo known to be by the Teſtator; and the particular Charities given by the Teſtator are particularly and expreſly Named and Limited, and do amount only to ſo much, as is leſs than the Value of the Land; and this Surplus is not diſpoſed of, and conſequently ought to be the Heir's: For as at the Common Law in a Will, what is not given away muſt deſcend, whether you ſpeak of Land or the Intereſt in it; ſo in Equity, whatſoever Truſt, or Part of a Truſt, is not declared and expreſſed, the ſame ſhall be for the Benefit of the Repreſentative of the Teſtator, either Heir or Executor, as the Caſe may happen: Then theſe Bequeſts or Deviſes being particular and expreſs, they do and will control and expound, nay reſtrain and qualify the Meaning of general precedent Words: That Expreſſion of his being determined to ſettle his Manor to charitable Uſes, will be qualified by the Particulars afterwards, as is *Nokes*'s Caſe in 4 *Rep.* and many others in the Books. Beſides, 'tis not accompanied with any Term of Univerſality, that excludes the Conſtruction contended for; and if it had been ſo largely expreſſed, thoſe general Words of his deſigning to ſettle the Whole, may be intended only as a Security, that the particular Charities may be certainly anſwered: And by ſuch Conſtruction all the Words of the Will may be ſatisfied; and then the Truſtees may convey the Premiſſes to the Heir at Law, and take Security for the ſame, ſaving and reſerving all the ſaid Charities deviſed, with all reaſonable Charges and Deductions, without Prejudice to the Will of the Teſtator, or to the ſaid Eſtate, which muſt nevertheleſs be liable to anſwer and make good the ſame; ſo that there can be no Damage done to any of the Parties or Intereſts concerned, by this Conſtruction; nay, it is the adding a further Security for their Payment. Now it is plain, he deſigned the Sums given to the particular Uſes, and no more, for that they are all ſo particular and expreſs; and it is purſuant to the Rules of Law and Equity, in all doubtful Caſes, to adjudge in favour of the Heir at Law, and not to extend the general Words of a Will to enlarge a Charity beyond the Intent expreſſed, eſpecially againſt a near Relation and Heir, as this is, *viz.* his Brother's Son.

Heir to be favoured.

Be-

Beſides the Teſtator was bred a Civilian, and as ſuch knew how fully to expreſs himſelf, if he had intended the Overplus to go in Increaſe of the Charity: Or if he had intended them more than is mentioned, he would have declared himſelf in ſuch Manner as ſhould exclude all Doubt.

Argument for the Reſpondent.

On the other ſide it was argued, That the Teſtator's Intent plainly appeared by his Will to diſpoſe all his Eſtate wholly to charitable Uſes, and that the Words of the Will were ſufficient to carry the whole Eſtate to that Purpoſe; and that it did not appear by his Will, that 'twas his Intent to give his Heir at Law any Thing out of his Real Eſtate; that his Determination to ſettle his Manor, with the Appurtenances, was to ſettle the Whole; that what is not diſpoſed of in Particulars, is to be directed by the Court of *Chancery*; that that Court hath done Right in directing it in Augmentation of the Charities mentioned, becauſe the Teſtator's Intent was moſt in Favour of thoſe which are ſo mentioned: That if the *Quære* were askt, What ſhall be done with the Surplus, if any? The Anſwer is natural, *viz.* I am determined to ſettle the Manor, that is the whole, on Charitable Uſes: That the Teſtator by his Will expreſſed ſome Care for his Siſter, and for *John Boucher* his Nephew, and other his near Relations; but neither by any Expreſſion or Implication pointeth at any Proviſion deſigned for his Heir at Law; but for the Excluding him of all Pretences hath bequeathed him 40 *s.* and no more: That the other is to contradict his plain Intent; 'tis to make a new Will for him, contrary to the Determination which he ſaith he had made: And accordingly the Decree was affirmed.

Decree affirmed.

Sir Richard Dutton, Plaintiff, verſus *Richard Howell, Richard Grey, and Robert Chaplain, Executors of Sir John Witham deceaſed.*

Impriſonment by Governour, &c. Plantations. Colonies. Plantation Laws. 3 Mod. 159. Declaration for falſe Impriſonment.

WRIT of Error on a Judgment given in *B. R.* for Sir *John Witham* and Sir *Richard Dutton*, and the Award of Execution thereof upon *Scire Fac'* brought by the Defendants, as Executors of Sir *John Witham*; and affirmed in the *Exchequer Chamber* in Treſpaſs and Falſe Impriſonment. The Caſe on the Record was thus: The Plaintiff *William* did declare *verſus Dutton*, for that he with Sir *Robert Davis* Bart. Sir *Timothy Thornhill*, *Henry Walrond*, *Thomas Walrond*, and *Samuel Rayner*, did 14 *Octob.* 36 *Car.* 2. at *L. in Par' & Ward'*, *&c.* aſſault, beat, and wound the Plaintiff, and impriſoned him, and his Goods then found did take and ſeize, and the Plaintiff in Priſon, and the Goods and

Chattels from the Plaintiff did detain and keep for three Months next following, by which the Plaintiff loſt the Profit he might have made of his Goods, and was put to Charges, *&c. Contra pac' & ad damp'* 13000*l.*

Not guilty as to Part.

The Defendant pleads Not guilty as to the *Venir' vi & armis*, and all the Aſſault, Impriſonment, and Detainer in Priſon before the Sixth of *November*, and after the Twentieth of *December* in the ſame Year; and as to the Beating, and Wounding, and Taking, Seizing and Detaining his Goods, and thereupon Iſſue is joined; and as to the Aſſault, Taking and Impriſoning the Plaintiff the Sixth of *November*, and Detaining him from thence until in and upon the Twentieth of *December*, the Defendant doth juſtify, for that long before, *viz.* the 28*th* of *Octob.* 32 *Car.* 2. by his Letters Patents ſhewn to the Court, did conſtitute and appoint the Defendant his Captain General and Chief Governor in and upon the Iſlands of *Barbadoes*, and *&c.* and the reſt of the Iſlands lying, *&c.* and thereby commanded him to do and execute all Things that belonged to that Government, and the Truſt in him repoſed, according to the ſeveral Powers and Directions granted to the Defendant by the Letters Patent, and Inſtructions with them given, or by ſuch other Powers or Inſtructions as at any Time ſhould be granted or appointed the Defendant under the King's Sign Manual, and according to the Reaſonable Laws, as then were, or after ſhould be made by the Defendant, with Advice and Conſent of the Council and Aſſembly of the Reſpective Iſlands; appoints twelve Men by Name, *viz.* Sir *P. L. H. D. H. W. S. N. T. W. J. Witham* the Plaintiff, *J. P. J. S. R. H. E. S. T. W.* and *H. B.* to be of the King's Council of the Iſland, during the Pleaſure of the King, to be Aſſiſtant to the Defendant with their Counſel in the Management of the Things and Concerns of the Government of the ſaid Iſland, in relation to the King's Service and Good of his Subjects there; and gives Power to the Defendant, after he himſelf had taken the Oath of Office, to adminiſter to every Member of the Council and Deputy Governor the Oaths of Allegiance and Supremacy, and the Oath of Office; with further Power to the Governor, by Advice and Conſent of Counſel, to ſummon and hold a General Aſſembly of the Freeholders and Planters there, and to make Laws, Statutes, and Ordinances for the good Government of the Iſland, and to be as near and conſonant, as conveniently may, to the Laws and Statutes of *England*, which Laws were to be tranſmitted, to be allowed by the King here; with Power alſo, by Advice and Conſent of Counſel to erect, and eſtabliſh ſuch and ſo many Courts of Judicature, as he ſhall think fit for hearing and determining all Cauſes, as well Criminal as Civil, according to Law and Equity, and to appoint Judges, Juſtices of Peace, Sheriffs and other neceſſary Officers, for adminiſtring of Juſtice, and putting the Laws in Execution, provided Copies of ſuch Eſtabliſhments be tranſmitted to the King to be allowed; and with further Power to the Governor to conſtitute and appoint Deputy Governors in the reſpective Iſlands

Juſtification as to Part, as Governor of Barbadoes, &c.

and Plantations, which then were, or ſhould be under his Command; to all and every which reſpective Governors, the King by theſe Letters Patent gave Power and Authority to do and execute what ſhould be commanded them by the Governor, according to the Power granted to them by this Commiſſion: And the Governor's Authority to continue during the good Will and Pleaſure of the King.

The Defendant further pleads, That after the Making of the Letters Patent, and before the Time of the Aſſault and Impriſonment, *viz.* 1 *Mart.* 33 *Car.* 2. he arrived at *Barbadoes*, and by Virtue of the Letters Patent aforementioned, he took upon him and exerciſed the Government of that and the other Iſlands, and continued to do ſo till the firſt of *May*, 35 *Car.* 2. when he had Licenſe to return to *England*.

That he, before his Departure, by Virtue of the ſaid Letters Patent, by a certain Commiſſion under his Hand and Seal, did conſtitute the Plaintiff, in his Abſence, to be his Deputy Governor in the ſaid Iſlands of *Barbadoes*, to do and execute the Powers and Authorities granted to the Defendant by the ſaid Letters Patent.

That the firſt of *Auguſt* following, the Defendant arrived at *London* in *England*; that the fourth of *May*, 35 *Car.* 2. after the Defendant's Departure, the Plaintiff took upon himſelf the Adminiſtration of the Government of the Iſland of *Barbadoes*; that the Plaintiff, not regarding the Truſt repoſed in him by the Defendant, nor the Honour of that Supreme Place and Office, did unlawfully and arbitrarily execute that Government and Office to the Oppreſſion of the King's Subjects, *viz. apud Lond' præd' in Par' & Ward' præd'*.

That after the Return of the Defendant to the *Barbadoes*, viz. 6 *Nov.* 35 *Car.* 2. at a Council holden for the Iſland of *Barbadoes* at St. *Michael*'s Town, before the Defendant *H. W. J. P. E. S. T. W. F. B.* which five are of the twelve named Council in the Letters Patent, and Sir *Timothy Thornhill* and *Robert Dawes*, Counſel for the Iſland aforeſaid, the Plaintiff then and there was charged, that he in the Abſence of the Defendant misbehaved himſelf in the Adminiſtration of the Government of the ſaid Iſland, *non tantum* in not taking the uſual Oath of Office, and not obſerving the Act of Navigation: And by his illegal Aſſuming the Title of Lieutenant Governor, and altering and changing Orders and Decrees made in *Chancery* of the ſaid Iſland, according to his own Will and Pleaſure, at his own Chamber, and altering the Senſe and Subſtance of them from what was ordered in Court by and with the Conſent of the Council; upon which it was then and there ordered in Council by the Defendant and Council, that the Plaintiff Sir *John Witham* ſhould be committed to, *&c.* until he ſhould be diſcharged by due Courſe of Law; by Virtue of which Order the Plaintiff the ſaid ſixth of *Nov.* was taken, and detained until the 20*th* of *Dec.* upon which Day he was brought to the Court of the General Seſſions of *Oyer* and *Terminer*, and then by

Court recommitted, which is the ſame Aſſault, Taking and Impriſonment, and Traverſes *abſque hoc*, that he was guilty of the Aſſaulting, Taking or Impriſoning him within the Time laſt mentioned at *London*, or elſewhere than in the Iſle of *Barbadoes*, or otherwiſe, or in other Manner than as before.

Demurrer, &c.

The Plaintiff demurred, and the Defendant joined in Demurrer, and Judgment was given for the Plaintiff, and a *Venire* awarded *tam ad triand' exitum quam ad inquirend' de dampnis, &c.* and the Iſſue was found *pro querent'* and 6 *d.* Damages, and on the Demurrer 500 *l.* Damages, and Judgment for Damages and Coſts amounting in the whole to 590 *l.*

The Plaintiff, Sir *J. Witham*, dying, *Trin.* 2 *Will. & Mar.* the Judgment was revived by *Scire facias* brought by *Howel*, *Gray* and *Chaplain*, Executors of Sir *J. W. quoad omnia bona & catalla ſua*, except one Debt due by Bond from *Henry Wakefield*. And at the Return of the *Scire fac'*, the Defendant appears and demurs to the *Scire facias*, and there is an Award of Execution; and thereupon a Writ of Error is brought in the *Exchequer Chamber*, and the Judgment was affirmed. Then a Writ of Error is brought in Parliament, and the General Error aſſigned.

Argument for Plaintiff in Error.

And here it was argued on the Behalf of the Plaintiff in the Writ of Error, that this Action did not lie againſt him, becauſe it was brought againſt him for that which he did as a Judge, and ſo it appeared on the Record, according to 12 *Rep.* 25. that the Rule ſeems the ſame for one ſort of Judge, as well as for another; that this Perſon was lawfully made a Governor, and ſo had all the Powers of a Governor; that this was a Commitment only till he found Security, tho' not ſo expreſſed; that this is not conuſable here in *Weſtminſter-hall*; that he was only cenſurable by the King; that the Charge is ſufficient, in that Sir *J. W.* had not taken the Oaths; that *male & arbitrarie executus fuit*, is Charge enough to warrant a Commitment; that this was a Charge before a Council of State, and there need not be all the Matters preciſely alledged to juſtify their Acts; and by the ſame reaſon Actions may lie againſt the Privy Counſellors here, and enforce them to ſet forth every Particular, which would be of dangerous Conſequence; the Plea might have been much ſhorter, as only that he was committed by a Council of State, and the Addition of the other Matters ſhall not hurt; and that the Charge was upon Oath ſhall be intended; no Preſumption ſhall be, that the Supream Magiſtracy there did irregularly; 'tis a Power incident to every Council of State to be able to commit: This Action cannot lie, becauſe the Fact is not triable here; the Laws there may be different from ours. Beſides no Action lies unleſs 'twere a malicious Commitment as well as cauſeleſs: And that no Man will pretend that an Action can lie againſt the chief Governor or Lieutenant of *Ireland* or *Scotland*; and by the ſame Reaſon it ought not in this Caſe; he had a Power to make Judges, and therefore he was more than a Judge; and they have confeſſed all this Matter by the Demurrer. The Statute of *Car.* 1. which reſtrains the Power of our Council

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of State ſuppoſes that they could commit; that in caſe of Crimes there they are puniſhable in that Place; and in Sir *Ellis Aſhburnham*'s Caſe there was a Remanding to be tried there, and if ſo, it can't be examinable here; and if not, this Action will not lie. And further, that what was done here, was done in a Court; for ſo is a Council of State to receive Complaints againſt State Delinquents, and to direct their Trials in proper Courts afterwards; that there was never ſuch an Action as this maintained; and if it ſhould, it would be impoſſible for a Governor to defend himſelf: Firſt, For that all the Records and Evidences are there. 2. The Laws there differ from what they are here; and Governments would be very weak, and the Perſons intruſted with them very uneaſy, if they are ſubject to be charged with Actions here for what they do in thoſe Countries; and therefore 'twas prayed that the Judgment ſhould be reverſed.

Argument for Defendants in Error.

On the other ſide 'twas argued for the Plaintiff in the Original Action, That this Action did lie, and that the Judgment upon it was legal: That ſuppoſing the Fact done in *England*, the Plea of ſuch Authority ſo executed at *Plymouth*, or *Portſmouth*, or the like, had been ill; for that Liberty of Perſon by our Law is ſo ſacred, that every Reſtraint of it muſt be juſtified by ſome lawful Authority, and that Authority muſt be expreſly purſued: That here was no Authority to commit; for that muſt be either as a Court of Record, or as Juſtices of Peace, Conſtable, or other Officer conſtituted for that Purpoſe; that the Letters Patent are the only Juſtification inſiſted on, and that gives none; 'tis true, the Power of Committing is Incident to the Office of a Court; here's only the Government of the Place committed to Sir *Richard Dutton*, with a Power to erect Courts, and appoint Officers, but none to himſelf: He in Perſon is only authorized to manage and order the Affairs; and the Law of *England* takes no Notice of ſuch an Officer, or his Authority; and therefore a Court of Law can take Notice of it no further, or otherwiſe, than as it doth appear in pleading: The Council is not conſtituted a Court; they are by the Letters Patent only to adviſe and aſſiſt the Governor; and the Governor hath no Power to commit or puniſh, but to form and eſtabliſh Courts to do ſo; which imports the direct contrary, that he had no ſuch Power: The Ends of appointing the Council, as mentioned in the Letters Patent, are quite different, *viz.* to aid the Regent by their Advice, not to act as of themſelves; and if neither the Governor of himſelf, nor the Council of it ſelf, had ſuch a Power, neither can both together have it: A Court of Juſtice is not to be intended, unleſs the ſame be ſpecially ſhewn: Excepting the Caſe of the common known general Courts of Juſtice in *Weſtminſter-hall*, which are immemorial; if any Thing be juſtified by the Authority of other Courts, the ſame muſt be preciſely alledged, and how their Commencement was, either by Cuſtom or Letters Patent: Here it appears by the Plea it ſelf, that they had Juſtices of *Oyer* and *Terminer* appointed: It doth not appear that he or the Council were

Judges of Things of this kind. Beſides, when a Council is conſtituted, as here was Twelve by Name, that muſt be the Majority, as is the Dean and Chapter of *Fernes* Caſe, *Davis's Rep.* 47. and that's Seven at leaſt, which are not in this Caſe. There muſt be a Majority, unleſs the Erection did allow of a leſs Number. The Practiſe of the Courts of *Weſtminſter-hall* does not contradict this, for there 'tis a Court, whether more or leſs, and ſo it hath been Time out of Mind. But here's a new Conſtitution; and the Rule holds ſo in Commiſſions of *Oyer* and *Terminer*, if the Direction be ſo: As is the Caſe in *Plowden* 384. the Earl of *Leiceſter*'s Caſe. If a Mayor and three Aldermen have Conuſance of Pleas, what a Mayor and two does is null and void. And if there be no Direction in particular for the Number, the Law requires the Majority. So that here was no Council, becauſe but five of them preſent.

The Council have not the Power, but the Governor with the Advice and Aſſent of the Council; and ſo ought their Pleading to have been according to their Caſe; That if a Man juſtifies as a Judge to excuſe him from an Action, he muſt ſet forth his Authority, and the Cauſe muſt appear to be within his Conuſance; and ſo are Multiudes of Caſes, 3 *Cro.* 130. 2 *Leon. pl.* 43. and 1 *Cro.* 153, 557, 579, 593. 12 *Rep.* 23, 25. *Mod. Rep.* 119.

But taking it as a Council, neither Perſon nor Thing are within its Juriſdiction; for if their Doctrine be true, that by being Governor, he is ſo abſolute, as to be ſubject only to the King; then what Sir *John Witham* did, being while and as Deputy Governour, which is the true Governor to all Purpoſes *in abſentia* of the other, is not examinable by a Succeſſor. But admitting for the preſent, that by the Law one Magiſtrate may be puniſhable before his Succeſſor for Miſcarriages which were committed *colore Officii*; yet here are no ſuch Miſcarriages ſufficiently alledged to be charged on him. 1. There's no Pretence of an Oath, nor Circumſtances ſhewing a reaſonable Cauſe of Suſpicion, one of which ought to have been. 2. In pleading no Allegation is ſufficient, if it be ſo general, as the Party Opponent can't in Reaſon be ſuppoſed capable of making an Anſwer to it; and that is the true Cauſe why our Law requires Certainty: He did *male & arbitrarie* execute the Office to the Oppreſſion of the King's Subjects. No Man living can defend himſelf on ſo general a Charge as this is: For if Iſſue had been taken thereon, all the Acts of his Government had been examinable, which the Law never allows: Then the Particulars are as general; 1. That he did not take the uſual Oath; and it doth not appear what Oath, or if any was requirable of a Deputy Governor, nor who was to adminiſter it; ſo that *non conſtat*, whether 'twas his Fault or the Governor's; beſides, that's no cauſe of Impriſonment, for any Thing which appears in the Plea. 2. Aſſuming illegally the Title of Lieutenant Governor; that is ſo trivial, as it needs no Anſwer; for Deputy Governor and Lieutenant Governor are all one, *locum tenens* is a Deputy, *& ceontra.* 3. Altering of Orders at his Chamber *ad libitum*, which were made in Court; not ſaid that there was any ſuch Court, or what Orders, or where made; *& non tantum* without *etiam* or *ve-*

rum etiam, is not a ſufficient poſitive Allegation: Not ſaid that he was guilty, but only charged; and not ſaid how charged, whether with or without Oath, in Writing or by Parol; nor ſaid to be in any ſuch Manner as that the Council ought or might receive it: tho' Oath be not neceſſary to be mentioned in the Commitment; yet it ought to be alledged in pleading, becauſe 'tis neceſſary to warrant the Commitment, as was held in the Lord *Yarmouth*'s Caſe in *B.R.* It could not be to ſecure his Anſwering the ſame, for not ſo expreſſed; and 'tis not ſaid that Sureties were demanded or denied, or that he had Notice of the Charge; and ſurely this was bailable.

Juriſdiction. As to the *Quære*, If conuſable here; 'twas argued, That they had not pleaded to the Juriſdiction, nor any Matter to ouſt the Court of its Juriſdiction: If they intended by this Plea to have done that, they ſhould have given Juriſdiction to ſome other Court in ſome other Place; but this is not done; for if an Injury, 'tis relievable ſomewhere in the King's Dominions; and whether it be ſo, or not, is examinable ſomewhere: Now here is a Wrong complain'd of, as done by one *Engliſhman* to another *Engliſhman*, and a Juriſdiction attacht in the *King's Bench*, both of Cauſe and Perſon, by the Bill filed, and his Defence to it: Beſides Juriſdiction could not be examined in the *Exchequer Chamber*, becauſe both the Statute and the Writ of Error expreſly provide againſt it; and this Writ of Error is founded upon that Affirmance, and therefore queſtionable, whether that could be inſiſted on here? But ſuppoſing it might, 'twas argued that the Action lies, for that 'tis a tranſitory Action, and follows the Perſon whereſoever he comes under the Power of the Common Law Proceſs: And that a Man may as well be ſued in *England* for a Treſpaſs done beyond Sea, as in *Barbadoes*, or the like Place; as for a Debt ariſing there by Specialty, or other Contract; that no Body but *Prynne* ever denied it, and he did ſo only in caſe of Bonds dated there: That many Actions have been maintained and tried here for Facts done in the *Indies*, notwithſtanding ſpecial Juſtifications to them, and the Trials have been where the Actions were laid: There was quoted *Dowdale*'s Caſe, 6 *Rep.* 47, 48. and 7 *Rep.* 27. and if otherwiſe, there would be a Failure of Juſtice in the King's Dominions. 32 *Hen.* 6. 25. *vide Jackſon* and *Criſpe*'s Caſe, *Sid.* 462. 2 *Keble* 391, 397.

'Twas then argued, That whatſoever Queſtion might be made about the Trial of the Iſſue, if one had been joined; yet now Demurrer being to the Plea, if that Plea be naught, then the Plaintiff is to have Judgment upon his Declaration, and that is all right.

It was further ſaid, That the Juſtification of ſuch a *Tort* or Wrong ought to be according to the Common Law of *England*, for that *Barbadoes* is under the ſame Law as *England*; and if 'twere not, upon his pleading it muſt be intended to be ſo; and tho' they ſhould be intended different, yet the Defendant in the Action was obliged to the ſame Rules of Pleading; for tho' the Matter may juſtify him for an Act done there, which would not juſtify him for the ſame Act done here, yet he muſt ſhew that he hath

purſued the Rules of Law in that Place; or in caſe of no poſitive Laws, the Rules of Natural Equity: For either the Common Law, or new inſtituted Laws, or Natural Equity, muſt be the Rule in thoſe Places.

'Twas agreed, That according to *Calvin*'s Caſe, 7 *Rep.* 17. upon the Conqueſt of an Infidel Country, all the old Laws are abrogated *eo inſtante*, and the King impoſes what he pleaſes; and in caſe of the Conqueſt of a Chriſtian Country, he may change them at Pleaſure, and appoint ſuch as he thinks fit; tho' *Coke* quotes no Authority for it, yet 'twas agreed, that this might be conſonant to Reaſon. But 'twas denied that *Barbadoes* was a Conqueſt, 'twas a Colony or Plantation, and that imports rather the contrary; and by ſuch Names theſe Plantations have always gone in Letters Patent, Proclamations, and Acts of Parliament. But whatſoever may by ſome be ſaid as to Statutes in particular binding there, the Common Law muſt and doth oblige there, for 'tis a Plantation or new Settlement of *Engliſhmen* by the King's Conſent in an uninhabited Country; and ſo is the Hiſtory of *Barbadoes* written by *Richard Ligon*, Printed at *London* 1673. *pag.* 23. ſays he, 'Twas a Country not inhabited by any, but overgrown with Woods. And *pag.* 100. They are governed by the Laws of *England*. And *Heylin* in his *Geography*, *lib.* 4. 148. ſays, The *Engliſh* are the ſole Colony there; they are called the King's Plantations, and not his Conqueſts; and he neither could, nor can now impoſe any Laws upon them different from the Laws of *England*. 'Twas argued that even our Statutes do bind them; and many of them name theſe Plantations as *Engliſh*; they have ſome Municipal Rules there, like our By-laws in the *Stanneries* or *Fenns*; but that argues nothing as to the General; which ſhall prevail when the one contradicts the other, may be a *Quære* another Time.

Barbadoes a Plantation, and not a Conqueſt.

By the 22 & 23 *Car.* 2. *cap.* 26. againſt the Planting of Tobacco here, and for the Regulation of the Plantation Trade, the Governors of thoſe Plantations are once a Year to return to the *Cuſtom-houſe* in *London* an Account of all Ships laden, and of all the Bonds, *&c.* And they are, throughout the whole Act, called the King's *Engliſh* Plantations, Governors of ſuch *Engliſh* Plantations, to ſome of the *Engliſh* Plantations; and *Parag.* 10. 'tis ſaid, Inaſmuch as the Plantations are inhabited with his Subjects of *England*; and ſo 'tis in 15 *Car.* 2. *cap.* 7. *ſect.* 5. and in 12 *Car.* 2. *cap.* 34. they are called Colonies and Plantations of this Kingdom of *England*. From all which 'tis natural to infer, That the Rules in caſe of conquered Places cannot prevail here; Conqueſt *eſt res odioſa*, and never to be preſumed; beſides, 'tis the People, not the Soil, that can be ſaid to be conquered. The Reaſon of a Conqueror's Power to preſcribe Laws, is the Conqueror's Clemency, in ſaving the Lives of the conquered, whom, by the Strict Right of War, he might have deſtroyed; or the preſumed Chance of Subjection, which the conquered Prince and People threw themſelves upon, when they firſt engaged in the War. But this is not pretended to here, tho' all the Caſes about this Subject were

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put below Stairs: Then taking it as the Truth is, certain Subjects of *England*, by Conſent of their Prince, go and poſſeſs an uninhabited deſert Country; the Common Law muſt be ſuppoſed their Rule, as 'twas their Birthright, and as 'tis the beſt, and ſo to be preſumed their Choice; and not only that, but even as Obligatory, 'tis ſo. When they went thither, they no more abandoned the *Engliſh* Laws, than they did their Natural Allegiance; nay, they ſubjected themſelves no more to other Laws, than they did to another Allegiance, which they did not.

This is a Dominion, belonging not only to the Crown, but to the Realm of *England*, tho' not within the Territorial Realm. *Vaughan* 330. ſays, That they follow *England*, and are a Part of it. Then 'twas argued further, if 'twere poſſible that it ſhould be otherwiſe, when did the Common Law ceaſe? On the Sea it remained in all Perſonal Reſpects; If Batteries or Wounds on Shipboard, Actions lay here: Then the ſame held when they landed there, and no new Laws could be made for them but by the Prince with their Conſent.

Occupancy. Beſides, Either the Right of theſe Lands was gained to the Crown, or to the Planters, by the Occupancy; and either way the Common Law muſt be their Rule: It muſt be agreed, That the firſt Entry gained the Right, and ſo is *Grotius de jure Belli & Pacis, lib. 2. cap. 8. ſect. 6.* and theſe Lands were never the King's, tho' they afterwards ſubmitted to take a Grant of the King. 'Tis true, in caſe of War, what is gained, becomes his who maintained the War, and doth not of Right belong to that Perſon who firſt poſſeſſed it. *Grot. lib. 3. cap. 6. ſect. 11.* But in caſe it be not the Effect of War, but only by Force of their firſt Entry, it muſt be conſidered what Intereſt they did acquire, and certainly 'twas the largeſt that can be; for an Occupant doth gain an Inheritance by the Law of Nations, and the ſame ſhall deſcend; then by the Rules of what Law ſhall the Deſcent be governed? It muſt be by the Laws of the Country to which they did originally, and ſtill do belong. But then ſuppoſing the Lands gained to the Crown, and the Crown to diſtribute thoſe Lands, the Grant of them is to hold in Socage, and that is a common Law Tenure; why are not their Perſons in like Manner under the Common Law? When a Governor was firſt received by, or impoſed upon them, 'twas never intended, either by King or People, that he ſhould Rule by any other Law than that of *England*. And if it had been known to be otherwiſe, the Number of Subjects there would have been very ſmall. In theſe Caſes their Allegiance continues, and muſt be according to the Laws of *England*; and 'twas argued, that *ex conſequenti* the Protection and Rule of them ought to be by the ſame Laws, for they are Mutual and Reciprocal, *unum trahit alterum*; and that Law, which is the Rule of the one, ſhould be the Rule of the other; beſides, 'tis the Inhabitants, not the Country, that are capable of Laws, and thoſe are *Engliſh*, and ſo declared and allowed to be; and conſequently there's no Reaſon why the *Engliſh* Laws ſhould

not follow the Perſons of *Engliſhmen*, eſpecially while they are under the *Engliſh* Government, and ſince the Great Seal goes thither. And further, a Writ of Error lies here upon any of their ultimate Judgments; ſo ſays *Vaughan* 402. and 21 *Hen.* 7. 3. that it doth ſo to all Subordinate Dominions; and tho' the Diſtance of the Place prevents the common Uſe of ſuch Writ, yet by his Opinion it clearly lies; and he reckons the Plantations Part of thoſe Subordinate Dominions. Now a Writ of Error is a remedial Writ, whereon Right is to be done, and that muſt be according to the Laws of *England*; for the *King's Bench*, in caſe of a Reverſial upon ſuch Writ, is to give a new Judgment, as by Law ought to have been firſt given. *Vaughan* 290, 291. ſays, It lies at Common Law to reverſe Judgments in any inferior Dominions; for if it did not, Inferior and Provincial Governments might make what Laws they pleaſe; for Judgments are Laws when they are not to be reverſed. It lay to *Ireland* by the Common Law, ſays *Coke* 7 *Rep.* 18. tho' there had been no Reſervation of it in King *John*'s Charter. Then 'twas inferred, that the lying of a Writ of Error proves the Laws to be the ſame, *i. e.* in general the Common Law to govern in both Places, from the Difference aſſigned between *Ireland* and *Scotland*; it lies not to *Scotland*, becauſe a diſtinct Kingdom, and governed by diſtinct Laws; and it lies to *Ireland*, becauſe ruled by the ſame, and conſequently, if a Writ of Error lies on the final Judgment there, it's a good Argument that the ſame Law prevails there. Theſe Plantations are Parcel of the Realm, as Counties Palatine are: Their Rights and Intereſts are every Day determined in *Chancery* here, only that for Neceſſity and Encouragement of Trade and Commerce, they make Plantation Lands as Aſſets in certain Caſes to pay Debts; in all other Things they make Rules for them according to the common Courſe of *Engliſh* Equity: The Diſtance, or the Contiguity of the Thing, makes no Alteration in the Caſe. And then 'twas ſaid, as at firſt, That this then was the ſame Caſe, as if the Impriſonment had been in *England* or on Shipboard, as to the Rules of Juſtification; that if there were another Law, which could juſtify it, the ſame ought to have been certainly pleaded.

As to the Inſtructions, theſe do not appear, and therefore are not to be conſidered in the Caſe, and they ſhould have been ſet forth, and no extraordinary Power is to be preſumed, unleſs ſhewn; for every Man in pleading is thought to make the beſt of his own Caſe, and conſequently that if 'twould have made for him, the ſame would have been ſhewn; and becauſe they are not ſhewn, they muſt be thought directive of a Government according to the Laws of *England*, ſince 'tis to a Subject of this Realm to govern other Subjects of this Realm living upon a Part of this Realm, and from the King thereof, who muſt be ſuppoſed to approve thoſe Laws which make him King, and by which he Reigns.

Then 'twas argued, Suppoſe this Governor had borrowed Money of a Man in the Iſland, and then had returned to *England*, and an Action had been brought for it, and he had pretended to juſtify the Receipt of it as Governor; he muſt have ſhewn his Power, the Law, and how he obſerved that Law; the like for Goods; the ſame Reaſon for Torts and Wrongs done *vi & armis*.

Now the Court below could conſider no other Power or Law to juſtify this Act, but the Common Law of *England*, and that will not do it for the Reaſons given; and if it be juſtifiable by any other, it muſt be pleaded; and what he hath pleaded is not purſued, *&c.*

As to the Commitment by a Council of State, what it means is hardly known in the Law of *England*; and that Authority which commits by our Law, ought to be certain, and the Cauſe expreſſed, as all the Arguments upon the Writ of *Habeas Corpus* in old Time do ſhew; but here's no Council: And 'tis not ſaid ſo much as that he was *debito modo onerat'*: And as to the Demurrer, that confeſſes no more than what is well pleaded: And as to Conſequences, there's more Danger to the Liberty of the Subject, by allowing ſuch a Behaviour, than can be to the Government by allowing the Action to lie: And therefore 'twas prayed that the Judgment might be affirmed.

Reply for Plaintiff in Error.

It was replied on Behalf of the Plaintiff in the Writ of Error, That notwithſtanding all that had been ſaid, the Laws there were different, tho' the Foundation of them was the Common Law, that they would not enter into that Queſtion, What ſort of Title at firſt gave Right to theſe Lands? But that this was a Commitment by a Council of State: And, as to the Objection of too general Pleadings *in male & arbitrarie exercendo, &c.* tho' the Inducement of the Plea was ſo; there were other Matters more particularly pleaded; the Altering the Decrees in his Chamber, which was ſufficient: And as to the Objection, That 'tis not alledged in the Pleadings, that the Charge in Council againſt *Witham* was upon Oath; they anſwered, That 'tis not eſſential, tho' prudent, to have the Charge upon Oath before Commitment; Matters may be otherwiſe apparent. And as to the Objection, That the Warrant of the Council for the Commitment was not ſhewn; they ſaid that it lay not in their Power, becauſe 'twas delivered to the Provoſt Marſhal, as is Authority for the Capture and Detention of him, and therefore did belong to him to keep: And that the Council, tho' they were not a Court, yet they had Juriſdiction to hear the Complaint, and ſend him to another Court that could try the Crime; and tho' it did not appear that the King gave any Authority to the Governor and Council to commit, yet 'tis Incident to their Authority, as being a Council of State; the Council here in *England* commit no otherwiſe; and where the Commitment is not authorized by Law, the King's Patent gives no Power for it: But the Government muſt be very weak, where the Council of State cannot commit a Delinquent, ſo as to be forth-

coming to another Court that can puniſh his Delinquency: And therefore prayed that the Judgment ſhould be reverſed, and the ſame was accordingly reverſed. Judgment reverſed.

Philips verſus *Bury*.

WRIT of Error to reverſe a Judgment given for the Defendant in the Court of *King's Bench*, where the Caſe upon the Record was thus; *Ejectione firmæ* on the Demiſe of *Painter* as Rector, and the Scholars of *Exeter* College in *Oxon*, for the Rector's Houſe. The Defendant pleads ſpecially, That the Houſe in Queſtion is the Freehold of the Rector and Scholars of the College; but he ſays, That he, the ſaid Dr. *Bury*, was then Rector of that College, and that in Right of the Rector and Scholars he did enter into the Meſſuage in Queſtion, and did Eject the Plaintiff, and ſo holds him out; *abſque hoc*, That *Painter*, the Leſſor of the Plaintiff, was at the Time of making the Leaſe in the Declaration Rector of that College; *& hoc paratus eſt verificare, &c.* Extent of Viſitatorial Power. Colleges, &c. 4 Mod. 106, 107. Skin. 447, &c. Carth. 180.

The Plaintiff replies, That the Meſſuage belongs to the Rector and Scholars, but that *Painter* the Leſſor was Rector at the Time of the Leaſe; *& hoc petit quod inquiratur per Patriam, &c.* and thereon Iſſue is joined, and a Special Verdict.

The Jury find that *Exeter* College is and was one Body Politick and Corporate, by the Name of Rector and Scholars *Collegij Exon' infra Univerſitat' Oxon'*, that by the Foundation of the College there were Laws and Statutes by which they were to be governed; and that the Biſhop of *Exeter* for the Time being, and no other, at the Time of founding the College, was conſtituted by Virtue of the Statute concerning that Matter hereafter mentioned, ordinary Viſitor of the ſame College, *ſecundum tenorem & effectum ſtatut' eam rem concernent'*, That the Biſhop of *Exeter*, who now is, is Viſitor according to that Statute. Then they find the Statute for the Election of a Rector, *prout*, *&c.* Special Verdict.

Then they find the Oath required of the Rector, That ſo long as he ſhould remain in that Office, he ſhould be true and faithful to the College and its Lands, Tenements, Poſſeſſions Eccleſiaſtical and Secular, Rights, Liberties and Privileges, and all its Goods, moveable and immoveable would keep and defend, and all the Statutes, Ordinances and Cuſtoms of the College he would obſerve, and endeavour that they ſhould be obſerved by all Scholars, Graduates and Under-graduates, *&c.* That he would occaſion no Trouble or Grievance to any of the Scholars *contra juſtitiam, charitatem & fraternitatem*, but according to the beſt of his Judgment and Conſcience he would cauſe due Diſcipline to be uſed according to the Form of the Statutes of the College:

College: That he would maintain and defend all Suits for the College, but never begin one wherein any Diſadvantage or great Prejudice may happen to the College, without the deliberate Conſent of the major Part of the Fellows. And if any Variance happen between him and the Scholars, and the ſame be not ended within ten or twenty Days, by the Sub-Rector, Dean and three ſenior Scholars of the College, that then he would ſtand to the Direction of the Chancellor, or in his Abſence, of the Vice-Chancellor or his Commiſſary, and his Award would faithfully obſerve, *& ſi contigerit me in poſterum propter mea demerita, ſeu cauſas in ſtatut' content', juxta formam ſtatutorum ab officio meo expelli, ſeu alias amoveri, omnibus & ſingulis juris & fact' remediis per quæ vel quæ petere me poſſim reconciliari vel in integrum reſtitui circa præmiſſa quantumcunque aliis probitat' & vitæ merita mihi Suffragentur in vim pacti renuncio in his ſcriptis*, and that he would obſerve the Statutes, according to the plain Grammatical Senſe, *&c.*

Then they find another Statute, *Si quis Scholarium vel Electorum*, be convict of Adultery, Incontinency, *hæreſis pertinacis*, wilful Homicide, manifeſt Perjury, frequent Drunkenneſs, *alteriuſque publicæ turpitudinis*, before the Rector, Sub-Rector, Dean and five other ſenior Scholars, or the major Part of them with the Conſent of the ſaid Rector, he ſhall be *ipſo facto* expelled, *nulla alia monitione præmiſſa*. And in the ſame Statute (which is intituled *de cauſis propter quas Scholares privari debeant, & de diſſentionibus ſedandis*) 'tis farther eſtabliſhed, *quod ſi aliqua diſcordia, ira, rixæ aut diſſentionis materia (quod abſit) in dicto Collegio ſuborta ſit, qualitercunque inter quoſcunque Scholares, aut alios in dicto Collegio morantes, niſi ſic diſſentiones intra unum diem intra ſe concordent, tunc celerius, cautius & melius quo fieri potuit per prædict' Rectorem, vel in ejus abſentia Sub-rectorem & tres Scholares, ex præſentibus in Collegio omnino Seniores intra biduum ſedetur & pacificetur hujuſmodi diſſentio; ſi vero ipſi ad eand' ſedand' non ſufficiant, tum Rector (aſſumpto ſibi Sub-rectore, Decano & aliis quinque Scholaribus omnino Senioribus per quos veriſ' ſedari poterit) ſummarie & de plano eam examinat, ſicque finis diſcordiæ, iræ, diſſentioni, & jurgio hujuſmodi, favore, partialitate, ira, odio, & invidia quibuſcunque ceſſantibus, intra tres dies lapſum illius bidui immediate ſequentes imponatur: & quicquid Rector cum præd' vel major' parte eorundem duxerit ordinandum & agendum per partes diſcordantes firmiter in virtute eorum juramenti obſervetur, & executioni abſque contradictione cujuſcunque demandetur: nec liceat alicui de dicto Collegio, cujuſcunque gradus aut ſtatus extiterit, occaſione rixæ, jurgij aut diſſentionis intra dictum Collegium aut extra inter eoſdem ortæ vel motæ, proſecutionem facere, aut litem aliquam movere vel aliquem impetere, aut ad judicium trahere, coram aliquo judice extrinſeco Eccleſiaſtico vel Secular', ſed volumus omnino quod hujuſmodi jurgia, iræ, rixæ, diſcordiæ & diſſentiones (quæ per Dei gratiam raro aut nunquam contingent) per perſonas prædict' aliqua ordinatione bona ſeu concordia terminentur & finientur,*

The Jury finds, That from the Foundation of the College there was, and yet is, *quidam ordo Scholarium, vocat' veri & perpetui Scholares*, and that by the Statutes, every Scholar who hath paſſed his Probation Year, and is approved to be a true and perpetual Scholar, ſhall take an Oath before the Rector, or in his Abſence before the Sub-rector, *&c.* to obſerve the Statutes of the College, and to endeavour that others obſerve them too, or otherwiſe to undergo the Penalties on them inflicted, without Contradiction, according to the true Form and Effect of theſe Statutes: To obey all Injunctions, Expoſitions and Conſtructions by the Reverend Biſhops, Succeſſors of the firſt and original Founder, *ſuper dubiis Statut' emergentibus ad eoſdem Epiſcopos ex conſenſu Rectoris & majoris partis Scholarium delat' faciendis*; to be true to the College, neither to do, nor wittingly to ſuffer to be done, any Prejudice, Damage or Scandal to the ſame; to obey, aſſiſt, and reverence the Rector, Sub-rector, *&c.* and other Superiours, Scholars *in licitis ac honeſtis, & maxime in eorum conventionibus & in negotiis Collegij quatenus Statuta jubent aut requirant*, effectually to obey all Directions and Orders of the Rector, Sub-rector, *&c.* to maintain and defend the Rights and Liberties, the Honeſty and good Fame of the College, and its Scholars, *&c. Item ſi contingat me poſthac per Rectorem aut in hujuſmodi rebus habentes intereſſe corrigi & puniri, aut a dicti Collegii ſuſtentatione ejici & expelli, excludi, privari, vel amoveri propter mea forſan demerita, ipſum Rectorem ſeu alias perſonas ſeu eorum aliquem, occaſione expulſionis vel correctionis hujuſmodi, nunquam proſequar, moleſtabo, vel inquietabo, per me, alium vel alias, ſeu ab aliis proſequi vel moleſtari ſeu inquietari ea de cauſa quantum in me fuerit permittam; ſed ſponte ſimpliciter vel abſolute, omni actioni, contra Rectorem aut alios dicti Collegij Scholares quomodo libet appellationi & querelæ in ea parte faciendis, ac quorumcunque literar' impetrationi precibus principum, prælatorum, procerum, magnatum, & aliorum quorumcunque, quibus poſt' adjus, titulum & poſſeſſionem vindicandum reconciliari, ac quibuſcunque juris & facti remediis per quæ me petere poſſem integrum reſtitui, quantumcunque alias mihi probitatis & vitæ merita ſuffragantur, in vim pacti renuncio:* To be juſt and impartial in Election of Scholars, not to reveal the Secrets, *&c.* not to deſert the College to be of another, without Licenſe, *&c.*

The Jury finds, That according to the Statutes there are probationary Scholars, who are to be ſuch for a Year, before they be admitted to be true and perpetual Scholars, and that every one choſen in for a Probationer, ſhall ſwear that he cannot certainly expend above four Marks *per Annum*; to be true to the College, and not to reveal Secrets to its Scandal, Prejudice or Danger; not to make or procure any Conventicles, Conſpiracies, or Contracts againſt the Ordinances and Statutes of the College, or the Honour of the College or the Rector, *&c.* to promote Peace there; *& ſi contingat me (quod abſit) juxta formam & exigentiam Statutor' a prædict' Collegio expelli ſeu amoveri per Rectorem & alias*

perſon' in hujuſmodi expulſione intereſſe habentes, &c. in like Manner as the perpetual Scholars ſwear.

The Statute of Viſitation.

Then the Jury find the Statute *de Viſitatione*, reciting how prone Mankind is to Evil, and Time changeth the beſt Things, and that 'tis impoſſible to make Laws, but by Mis-conſtruction, Fraud, or other Practiſe may be diſſolved, that he confided in the Biſhops of *Exeter* his Succeſſors (*quos dicti Collegij Patronos & viſitatores relinquimus*) that thoſe who are brought thither through fervent Charity, being inflamed with Chriſtian Faith, might watch to the preſerving that Nurſery; that the Statutes and Ordinances of the College might be ſtudiouſly obſerved, Virtue and Learning be nouriſhed, their Poſſeſſions and Goods, ſpiritual and temporal, may flouriſh, their Rights, Liberties and Privileges may be defended: *Ea de cauſa liceat Domino Epiſcopo* Exon' *qui pro tempore fuerit, & nulli alij nec aliis, quoties per Rectorem dicti Collegij, & in ejus abſentia Sub-rectorem & quatuor alios ad minus ex ſeptem maxime ſenioribus Scholaribus, fuerit requiſitus, necnon abſque requiſitione ulla de quiuquennio in quinquennium ſemel ad dictum Collegium per ſe, vel ſuum Commiſſar' quem duxerit deputandum, libere accedere; cui quidem Reverendo*--He gives full Power upon all Articles in the Statutes contained, and other Articles concerning the Eſtates, Honours or Profits of the College, to interrogate and examine the Rector, Scholars, and elect, and to compel them by Oath, and Cenſures if need be, to ſay the Truth, and all Crimes and Offences of the ſaid College whatſoever, *Commiſſa & in ea viſitatione Comperta*, according to the Quality of the Offence to puniſh and reform, and to do all Things requiſite *quoad eorum correctionem & reformationem, etiamſi ad deprivationem ſeu amotionem Rectoris, Sub-rectoirs aut alterius cujuſquam, ab adminiſtratione ſua vel officio, ſive ad amotionem alicujus Scholaris vel Electi ab eodem Collegio, Statut' & Ordinationibus id exigentibus, procedere contingat: Stat' inſuper*, that none *in dictis viſitationibus in dicto Collegio faciend' contra Rectorem, Sub-rectorem aut aliquem alium ipſius Collegij quemcunque dicat, deponat ſeu denunciat, niſi quod verum crediderit, ſeu de quo publica vox vel fama laboraverit contra eundem in virtute juramenti ab eo prius Collegij præſtiti: Ordinantes præterea ut Dominus Epiſcopus* Exon *cum in perſona propria viſitare aut præmiſs' facere dignatur, Rector & duo Scholares ex præſentibus maxime Senioribus unam in Collegio refectionem quadraginta ſolidor' expenſas non excedentem eidem Epiſcopo humiliter & reverenter offerent. Commiſſario autem cum præmiſſa fecerit duas refectiones in Collegio vel viginti ſolidos per manus Rectoris de bonis Collegij perſolvi concedimus pro omnibus laboribus & expenſis in hanc Cauſam tam in itinere quam in Univerſitate tempore hujus viſitationis. Itaque Dominus Epiſcopus quadragint' ſolid', Commiſſarius vero viginti ſolid', in uno & eodem anno pro actu viſitationis ad ſumptus Collegij non excedat; nec inceptam aliquam viſitationem ultra duos dies proxime ſequentes, aut ex cauſis urgentiſſimis & rariſſimis ultra tres dies prorogari aut continuari ullo pacto volumus, ſed lapſo & acto illo biduo, & quando de cauſis prædict' ulterius prorogatur triduo tranſacto, ea ipſa viſitatio illa pro terminata & diſſoluta habeatur.*

Et

Et ſi quæ in ea comperirent corrigenda & reformanda, quæ brevitate temporis corrigere & reformare non potuerint, ea rectori in ſcriptis tradant, qui ea omnia ſecundum formam & exigentiam ſtatutorum ſine dilatione quantum in eo erit corrigere & reformare tenebitur ſub pœna contemptus : Then in the Name of *Jeſus*, and as they will anſwer it at the laſt Tribunal, that neither for Fear, Hatred, Favour, Illwill, *vel prece, vel pretio*, they do or neglect to do any of the Premiſſes, *&c.*

Of Correction.

Statuimus præterea, ut Rector, Sub-rector, ſcholares aut alius quiſpiam cujuſcunque ſortis, dicti collegii ſuper Exceſſibus vel delictis in Viſitationibus & inquiſitionibus per dictum Epiſcop' Exon *vel ejus commiſſarium ut permittitur faciendis accuſatus vel detectus, copiæ compertorum vel detectorum hujuſmodi tradidi aut oſtendi aut nomina detegentium non oſtendantur : ſed ſup' iiſdem compertis aut detectis ſtatim coram Epiſcop' vel ejus commiſſario perſonaliter reſpondeat, ac correctionem debitam ſubeat pro eiſdem, ſecund' tenor' ſtatut', ceſſantibus quibuſcunque provocationibus, appellationibus, querelis & aliis juris & facti remediis, per quæ ipſius correctio & punitio deferri ſeu impediri valeat.*

Puniſhment.

Deprivation or Expulſion.

Si tamen ad privationem aut inhabilitatem rectoris, aut expulſionem ſcholaris alicujus per Epiſcop' aut ejus commiſſarium agatur : tum oſtendantur ei delicta, quibus ſi non potuerit rationabiliter & honeſte reſpondere, ſuamq; innocentiam probabiliter oſtendere, & ſeſe ſuper objectis juſte purgare, amoveatur ſine appellatione aut ulteriori remedio ; Dummodo ad ejus expulſionem concurrat conſenſus Rectoris & trium ex ſeptem maxime ſenioribus Scholaribus tunc in univerſitate præſentibus ; ſine quorum conſenſu irrita ſit hujuſmodi expulſio & nulla ipſo facto : & inſuper ſi contra Rectorem ad amotionem ab officio per hujuſmodi Domini Epiſcop' commiſſarium, etiam conſentientibus quatuor ex ſeptem maxime ſenioribus ſupradictis, procedat', non negamus ei omnes exceptiones, defenſiones juſtas & honeſtas, apud ipſum Dom' Epiſcopum Exon, *dummodo ulterius non appellet, non obſtante hac ordinatione prædicta aut aliis quibuſcunque.*

Deprivation of the Rector.

The Cauſes.

The Jury further find, that in another Statute, *propter quas cauſas Rector officio privari debet.* It is thus, *Cum bono providoq; Rectore nihil ſit utilius ; & imprudenti, inepto, indigno, penitus inhabili, criminoſo nihil ſit deteſtabilius ; ſtatuimus ut Rector quicunque propter terrarum, tenementorum, reddituum, poſſeſſionum ſpiritualium aut temporalium ſua culpa diminutionem ſeu alienationem, vel propter detractionem, ablationem, alienationem illicitam bonorum & rerum ipſius Collegii, infamiam, adulterium, incontinentiamq; negligentiam intolerabilem, hæreſin pertinacem, homicidium voluntarium, perjurium manifeſtum, crebram ebrietatem, & propter longiorem abſentiam a Collegio quam Statuta permittunt, vel procurationem ſui ſibi officii per largitiones inhoneſtas datas, dandas, vel promiſſas, vel quacunq; via aut modo illicito, & propter uſuram, ſimoniam, aliamve cauſam ipſum Rectorem reddentem criminaliter irregularem vel aliter penitus inhabilem, necnon propter infirmitatem infectivam & contagioſa' perpetuam, cujus occaſione non poterit abſq; ſcandalo officium hujuſmodi exercere, ab eo penitus amoveatur ;*

The Manner.

Ad cujus amotionem hoc modo procedatur, viz. *ut ſtatim, vel ſaltem inter*

inter quindecim dies poſtquam aliquid præmiſſor' commiſerit, vel in eorum aliquod inciderit, primo per ſub-rectorem, aſſiſtentibus ei quinq; ſcholaribus maxime ſenioribus dicti Collegii, moveatur Rector, eiq; bonis rationibus ſuadeant ad voluntarie cedendum officio: quod ſi ſponte inter triduum cedere noluerit, tunc intra octo dies poſt hujuſmodi monitionem ſubrectoris, aſſenſu & teſtimonio omnium perpetuorum ſcholarium dicti Collegii, vel ſaltem majoris partis eorundem, denunciabit' Domino Epiſcopo Exon *qui pro tempore fuerit, per duos ipſius Collegii ſcholares omnino ſeniores, cum literis aliquo ſigillo authentico, ac ſigno & ſubſcriptione alicujus Notarii publici ſignatis, vel ſaltem loco ſigilli authentici, ſubſcriptione ſubrectoris, ut præfertur, & majoris partis ſcholarium ac notarii publici ſigno communitis, cauſas, defectus, crimina, exceſſus, vel enormia Rectoris continentibus, proviſo quod omnes hujuſmodi atteſtantes, ac teſtimonium perhibentes, prius tactis ſacroſanctis Dei Evangeliis coram ſubrectore, ipſo primum id coram illis perficiente, ac deinde a ſingulis eorum id exigente, jurabunt, quod non per invidiam, malitiam, odium vel timorem,* nor for Love nor Honour of any other to be promoted to the Place, nor for Emulation, nor Envy, or by Conſpiracy, or the Procuration of any other they did teſtify it, but merely from a good Zeal and Love for the College, and the good Eſtate thereof: That the Biſhop, or his Vicar, *de cauſis, criminibus, exceſſibus & defectibus contra rectorem propoſitis, ſummarie & de plano, & extra ſtrepitum judicialem cognoſcat*; and if by ſufficient Proof he find the Accuſation true, he ſhall immediately remove him from his Office and Adminiſtration, and injoin the Scholars to proceed to the Election of a new Rector, according to the Form of the Statute aforeſaid: *Ceſſantibus appellationibus--- querelis, aut cujuſcunque alterius Juris & facti remediis, quibus hujuſmodi amotio valeat impediri aut differri, quæ omnia irrita eſſe volumus, ſtatuimus & decrevimus ipſo facto.*

Queen *Elizabeth* makes it a College.

The Jury find further, that Queen *Elizabeth*, 1. *Martii anno regni ejus octavo*, makes this Houſe, which was before a Hall, to be a College, and confirms the Statutes, and conſtitutes them a Body Corporate, and that one Sir *William Petre*, being willing to ſupply the Wants of the College, makes Addition to the Revenue, and to ſome defective Statutes, &c.

Proceedings in *Colmer's* Caſe.

Then they find that before the Time of the Demiſe in the Declaration, *viz.* 16 *Octob' Anno W. & Mar'* 1. one *James Colmer, A.M.* was Convicted before the Rector, Sub-rector, and five Seniors, of Incontinency with one *Anne Sparrow*, and therefore was

He Appeals to the Biſhop.

Expelled; that he Appealed to the Biſhop of *Exeter*; that 21ſt of *February*, 1689. he made his Commiſſion to Dr. *Maſters*, which Commiſſion is found *in hæc verba*, reciting that 'tis complained by *C.* that he was unjuſtly Expelled, and therefore appoints Dr. *Maſters* to hear and determine the ſame; that the Commiſſary proceeds to the Execution of that Commiſſion, and 22d

Viſitation by Commiſſion.

Martii he comes to the College and ſits in the Chapel with a Notary Publick, and *Colmer* appears, and the Rector and the reſt did not; then he Adjourns to the Hall, and Summons all the

Parties to attend there, and there Dr. *Bury* made and exhibited a Proteſtation in Writing under their Hands, ſetting forth the Oath of a Fellow not to Appeal and Proteſt againſt his Authority, to examine it; thereupon the Doctor proceeds and examines the Fact *ex parte*, and Reverſes the Sentence, and reſtores *Colmer*, *viz.* 25 *Martij*, becauſe the Proceſs was not tranſmitted.

Dr. *Bury* proteſts.

Colmer reſtored.

Then they find that the 16th of *May* the Biſhop iſſued his Citation to the Rector, or Sub-Rector, for a General Viſitation, to be held the 16th of *June* in the Chapel of the College; and accordingly the 16th of *June* the Biſhop comes to the College, and to the Door of the Chapel, which was ſhut up; and that the Porter was ſubject to the Government of the Rector, and bound to obey his Commands in ſhutting or opening the Doors; and certain of the Scholars did then offer *in area Collegij* a certain Writing under their Hands, proteſting againſt the Viſitation, as within Time, by reaſon of Dr. *Maſter*'s Viſitation: This is refuſed by the Biſhop: The Biſhop then Adminiſtred an Oath to *Webber*, of the Service of Citation; and then he called over the Names of the Rector and Scholars who appeared not; and not being admitted into the Chapel he departed.

General Viſitation.

Proteſtation, &c.

Then upon the 21ſt of *July* he ſummons a Viſitation upon the 24th of *July*, and the 23d of *July* the Rector, *&c.* proteſted againſt the intended Viſitation, inſiſting on their Statutes, which by Oath they are bound to obſerve, and this under their Common Seal. Then the Biſhop upon the 24th of *July* receives the Proteſtation, *quatenus de Jure*; then they departed, refuſing to agree to his Viſitation; Ten of the Fellows appeared, and ſubmitted; the reſt were pronounced *Contumacious* for not appearing: Then he Adminiſtred ſeveral Interrogatories, to diſcover Matter of Accuſation againſt the Rector and Fellows. In the Afternoon the Abſentees were called again, and declared in Contempt, and the Fellows ſuſpended, and Adjourned to the 25th; and then Dr. *Herne* was deprived for having a Living inconſiſtent with his Fellowſhip; Dr. *Bury* is pronounced *Contumacious*, *ſed de pœna in eum infligend' duxit deliberand'*: Then the 24th he calls for the Act, *actum quendam coram eo decimo ſexto die* Julij *ult' Elaps'*, *die alias ſtatut' pro viſitatione hujus Collegij expedit'*, *eundemque actum pro parte proceſs' hujus negotij viſitationis haberi decrevit.* Then he Adjourns to the 26th, and then he deprives Dr. *Bury* for Contumacy, with the Conſent of Four of the Seven ſenior Fellows not Suſpended; Twelve having been Suſpended. And they find further, That the Four Fellows which Subſcribed the Sentence of Deprivation were not of the ſenior Fellows, unleſs by the Deprivation of Dr. *Herne*, and the Suſpenſion of *George Vernon*, *Thomas Lethbridge*, *Benjamin Archer*, *Samuel Adams* and *Philip Thorne*; all which ſix, Half the Number of the Suſpended, were ſeniors to the Conſenting Scholars.

Proceedings to Dr. *Bury*'s Deprivation.

Then they find that after this Sentence *Painter* was elected into the Rectorſhip, *Concurrentibus omnibus requiſitis; ſi prædict' Officium Rectoris eo tempore fuit vacans*; and that Dr. *Bury*, 1 *June*, *Anno* Jac. 2. *& ſemper poſtea uſque ſententiam prædict'*, *ſi ſententia in contra' non valeat*, *ſemper poſtea fuit & adhuc eſt verus & legitimus Rector Collegij prædict'*.

That *William Painter* as Rector, and the Scholars of the ſaid College, did make the Demiſe in the Declaration, and thereon the Plaintiff entred, and Dr. *Bury* enters upon him, and holds, and yet doth hold him out *modo & forma prout in nar'*, *&c. ſed utrum ſuper totam materiam prædict' locus Rectoris per privation' prædictam præd' Arthuri legitime vacavit necne* the Jury are ignorant, *& ſi per inde locus prædict legitime vacavit*, *tunc pro querent'*; *& ſi non*, *tunc pro Defendent'*.

Concluſion of the Speciaf Verdict.

Argument for the Plaintiff in Error. See the Argument of *Holt*, C. J. in *Skinner*'s Reports.

It was argued on the Behalf of the Plaintiff in the Writ of Error, That this Judgment was illegal; and the general Queſtion was, Whether this Sentence of Deprivation, thus given by the Viſitor againſt Dr. *Bury*, did make the Rectorſhip void as to him, and ſo conſequently gave a Title to the Leſſor of the Plaintiff. But upon this Record the Queſtions were two: 1. Whether or no by the Conſtitution of this College the Biſhop had a Power in this Caſe to give a Sentence? 2. Suppoſing that he had ſuch a Power, Whether the Juſtice of that Sentence were examinable in *Weſtminſter-hall* upon that Action?

That the Biſhop had Power to give ſuch Sentence.

And 1. 'twas argued, That the Biſhop had ſuch a Power to give a Sentence; and it was agreed that he could make his Viſitation but once in five Years, unleſs he be called by the Requeſt of the College; and if he comes uncalled within the five Years, his Viſitation would be void: But yet the Viſitation of the 24th of *July* was a good Viſitation, and conſequently the Sentence upon it is good; that there was no Colour to make Dr. *Maſters*'s coming in *March* to examine *Colmer*'s Appeal upon the Viſitor's Commiſſion to be a Viſitation; and that becauſe it was a Commiſſion upon a particular Complaint, made by a ſingle expelled Fellow, for a particular Wrong and Injury ſuppoſed to be done to him, and not a general Authority to exerciſe the Viſitatorial Power, which is to inquire into all Abuſes, *&c.* *Colmer* complains that he was expelled without juſt Cauſe, and ſeeks to the Viſitor for Redreſs, they having expelled him for an Offence, of which he thought himſelf innocent; and the Viſitor ſends his Commiſſary to examine this particular Matter. Then 'twas urged, That tho' a Viſitor be reſtrained by the Conſtitutions of the College from viſiting *ex officio*, but once in five Years; yet as a Viſitor he had a conſtant ſtanding Authority at all Times to hear the Complaints, and redreſs the Grievances of the particular Members; and that is Part of the proper Office of a Viſitor to determine particular Differences between the Members, and thus is *Littleton*'s *Text*, *ſect.* 136. that Complaint may be made to the Ordinary or Viſitor, praying him that he will lay ſome Correction and Puniſhment for

Twofold Power of the Viſitor.

the ſame, and that ſuch Default be no more made, *&c.* And the Ordinary or Viſitor of Right ought to do this, *&c.* and ſo was it held in *Appleford*'s Caſe in the Court of *King's Bench*, who was expelled upon a like Occaſion as *Colmer* was; he appealed to the Biſhop of *Winton*, who was Viſitor, and he confirmed the Expulſion, and held to be good upon the Appeal; for the Hearing of Appeals is a ſtanding, fixed, conſtant Juriſdiction. Viſiting is one Act or Exerciſe of his Power, in which he is limited as to Time; but Redreſſing of Grievances is another, and his proper Office and Buſineſs at all Times. 'Tis the Caſe of all the Biſhops of *England*, they can viſit by Law but once in three Years, but their Courts are always open to hear Complaints and Determine Appeals; ſo that here, tho' but one Viſitation can be in five Years without Requeſt, yet the Power and Authority to hear and examine any Difference between the Members, and to relieve againſt any particular Injury, that is continual, and not limited.

Appleford's Caſe.

Then 'twas argued, That tho' what was done upon the 16th of *June* was with an Intention to Viſit, yet being denied to enter the Chapel, where the Viſitation was appointed to be held, it was none; and his Calling over the Names, was only to know who hindred the Viſiting; and his making an Act of it afterward, or Adminiſtring an Oath at the Time, can never be called one; tho' it hath been below ſaid to be a Tacking that of *June* to that of *July*; but that cannot be, for then it continued much longer than was intended; nay, much longer than it can by the Statutes of the College, for that is to ceaſe in three Days.

No Viſitation when obſtructed by the Contumacy of the Viſited.

It turns rather the other Way; having been hindred in *June*, he makes an Act of it in *July*, in order to call them to an Account for it, as for a Contumacy, and to bring them to Judgment at his Viſitation: 'Twas no more than taking an Affidavit of the Service of a Citation.

The Appointment of a Viſitation in the Hall was occaſioned by the Obſtruction met with at the Chapel; and 'twould be a very ſtrange Conſtruction, that when he deſigned a Viſitation, and was hindred, that the Hindrance and his Inquiry about it ſhould be called a Viſitation; and a former Contumacy in oppoſing an intended Viſitation, ſhould prevent their being ſubject to an actual true one.

Then 'twas argued, That there was no Neceſſity that there ſhould be the Conſent of the four ſenior Fellows to the Deprivation of the Rector; and by one of the Counſel it was owned, that if ſuch Conſent had been neceſſary, the Sentence had been a Nullity: But as this Statute is framed, 'twas argued, that the Biſhop might deprive tho' they did not concur, for theſe Reaſons:

Concurrence of Fellows not neceſſary.

1. By the Statutes, the Biſhop for the Time being, is made the ordinary Viſitor of *Exeter* College, and that where any one is Viſitor of a College, he hath full and ample Authority to Deprive

prive or Amove any Member of the College *quatenus* Viſitor. 2. There is an expreſs Power given to the Biſhop to proceed to the Deprivation of the Rector, or the Expulſion of a Scholar; and this in his Viſitation. And 3. The qualifying Words do not reſtrain it to be with the Conſent of the four Fellows; the Word is *Deprivatio* as to the Rector, and *Expulſio* as to the Scholar; tho' they are ſynonymous as to real Senſe, yet by this Statute they are differently applied: Then it ſays, *If the Biſhop do proceed, &c.* that only relates to the Caſe of a Scholar, becauſe the Word there uſed is *Expulſio*, which is never applied but to the Amotion of a Scholar; and it is impoſſible to relate to the Rector, for then he muſt conſent to his own Deprivation, for his particular Conſent is mentioned and required, and that is not to be expected: And in this Caſe, the Conſent of the ſenior Fellows, without that of the Rector, is not ſufficient.

But then the ſubſequent Words are, *That if the Rector be deprived by the Biſhop's Commiſſary, with the Conſent of the ſenior Fellows, he may appeal to the Biſhop:* 'Tis true, the Rector hath that Liberty, if the Commiſſary do deprive him; but there are no Words that do abridge the Biſhop's own Power. The Commiſſary's Power is reſtrained by theſe Words, *To have the Conſent, &c.* but the Biſhop's own Power hath no ſuch Qualification.

Power given by the Founder is the Rule.

It is objected, That 'tis unreaſonable to imagine a greater Power in the Viſitor over the Rector, than over the Scholars. But the Queſtion is not, What was fit and reaſonable for the Founder to have done? But to conſider, upon Peruſal of the Statutes, what he hath done? Suppoſe he doth give ſuch an abſolute Authority, 'tis what he had over the Thing granted; he might have reſerved to himſelf a Power of Revocation, or what other Power he thought fit; and by the ſame Reaſon he might give the like to a Viſitor of his Appointment; and having done ſo, it muſt be ſuppoſed that he had ſome Reaſons for ſo doing. The Rector hath a Privilege, not to be deprived without the Benefit of Appeal, if 'twere by the Commiſſary: The Scholars have no Appeal. He might think fit to truſt the Rector with his Viſitor the Biſhop, as ſuppoſing more Care would be taken by him of the Head of the College, than of inferior Members.

But the *Quære* is not, What Reaſon induced the Founder to make thoſe Appointments? He was Maſter of his own Charity, and might qualify it as he pleaſed; and he hath given it under this Qualification, That the Biſhop is made Viſitor, and might deprive the Rector, as he hath done, according to the Statutes and Conſtitutions of this College.

Whether the Juſtice of the Viſitor's Sentence examinable.

Then 2. The Sufficiency of the Cauſe of this Deprivation is never to be called in Queſtion, nor any Inquiry to be made in *Weſtminſter-hall* into the Reaſons or Cauſes of ſuch Deprivation, if the Sentence be given by him that is the proper Viſitor, created ſo by the Founder, or by the Law.

'Twas urged, That there are in Law two Sorts of Corporations aggregate, conſiſting of many Perſons; ſuch as are for Publick Government, and ſuch as are for Private Charity. Thoſe that are for Publick Government of a City, Town, Myſtery, or the like, being of Publick Concern, are to be governed according to the Laws of the Land, and to be regulated and reformed by the Juſtice of *Weſtminſter-hall*; of theſe there are no private Founders, and conſequently no particular Viſitors: There are no Patrons of theſe; they only ſubſiſt by Virtue of the King's Letters Patent, or Cuſtom and Uſage, which ſuppoſes Letters Patent, and are ſupported and ruled by the Methods of Law: Therefore, if a Corporation be made for the Publick Government of a Town or City, and there is no Proviſion in the Charter how the Succeſſion ſhall be, the Law ſupplies the Defect of that Conſtitution, and ſays it ſhall be by Election, as Mayor, Aldermen, and Common Councilmen, and the like; and ſo is 1 *Rolls Abridg.* 513. Diverſity of Corporations aggregate.

But private and particular Corporations for Charity, Founded and Endowed by private Perſons, are ſubject to the particular Government of thoſe who Erect them: Therefore, if there be no Viſitor appointed; in all ſuch Caſes of Eleemoſynary Corporations, the Law doth appoint the Founder and his Heirs to be Viſitors: They are Patrons, and not to be guided by the common known Laws and Rules of the Kingdom; but ſuch Corporations are as to their own Affairs to be governed by the particular Laws and Conſtitutions aſſigned them by the Founder.

Though ſome have ſaid, that the Common Law doth not appoint any Viſitation or Viſitor at all; yet 'tis plain, that it doth in Defect of a particular Appointment; it makes the Founder Viſitor; and it is not at his Pleaſure whether there ſhall be a Viſitor or not; but if he is ſilent during his Life-time, the Right will deſcend to his Heirs, and ſo is *Yelv. & 2 Cro.* where it is admitted on all Hands, that the Founder is Patron, and as Patron is Viſitor, if no particular Viſitor be aſſigned, 8 *Edw.* 7. 8. 8 *Aſſiſ.* 29. 9 *Hen.* 6. 33. 1 *Inſt.* 96. ſo that Patronage and Viſitation are neceſſary Conſequents one upon another; for this Viſitatorial Power was not introduced by any Canons or Conſtitutions Eccleſiaſtical, it is an Appointment of the Law; it ariſeth from the Property which the Founder had in the Lands aſſigned to ſupport the Charity: And as he is the Author of the Charity, the Law gives him and his Heirs a Viſitatorial Power, *i. e.* an Authority to inſpect their Actions, and regulate their Behaviour as he pleaſeth: For it is not fit, that the Members who are indowed, and that have the Charity beſtowed upon them, ſhould be left to themſelves, but they ought to purſue the Intent and Deſigns of him that beſtowed it upon them. The Founder and his Heirs Viſitors where no ſpecial Appointment.

Where the Poor are not Incorporated, *i. e.* they who are to have the Charity, but Truſtees are appointed, there is no Viſitatorial Power, becauſe the Intereſt of the Revenue is not veſted in them; but when they who are to enjoy the Benefit of the Gift are Incorporated, there, to prevent all Perverting of the Charity,

the Law doth eſtabliſh a Viſitatorial Power; and it being a Creature of the Founder's, 'tis reaſonable that he and his Heirs ſhould have that Power, unleſs it were devolved elſewhere.

'Twas further argued, That in our old Books deprived by Patron, and deprived by Viſitor, are all one; for this Authority to viſit is a Benefit that naturally ſprings out of the Foundation, and it was in his Power, if he pleaſed, to transfer it to another, and where he hath done ſo, the other will have the ſame Right and Authority as the Founder had.

Colleges, their Nature.

There's no Manner of Difference between an Hoſpital and a College, except only in Degree: An Hoſpital is for thoſe that are Poor and Mean, or Sick, *&c.* a College is for another Sort of Perſons, and to another Intent; the former is to maintain and ſupport them; this is to Educate them in Learning, that have not otherwiſe wherewithal to do it: But ſtill it is much within the ſame Reaſon of that of an Hoſpital; and if in an Hoſpital, the Maſter and Poor are incorporated, 'tis a College having a common Seal to act by, though it bears not that Name: Becauſe it is of an inferiour Degree; and in both Caſes there muſt be a Viſitor, as both are Eleemoſynary.

Hoſpitals.

A Viſitor being then of Neceſſity created by the Law, (as 8 *Edw.* 3. 69, 70. Every Hoſpital is viſitable, if lay, by the Patron, if Spiritual, by the Ordinary,) he is to Judge, and he may Expel; and as it is 8 *Aſſiſ.* 29, 30. he may deprive; the only *Quære* is, if he were Viſitor at this Time, for it hath been and muſt be agreed on all hands, that *Quatenus Viſitor* he might deprive; if he be a Viſitor as Ordinary, there lieth an Appeal from his Deprivation; but if as Patron, there's none; and then that Deprivation, whether Right or not, muſt ſtand.

Objections anſwered. No Court.

As to the Objection, that 'tis not the Sentence of a Court, and therefore not Concluſive; 'tis not material whether it be a Court or not, but the *Quære* is, if he had Juriſdiction and Conuſance of the Perſon and Thing; and if he had, then his Sentence holds; and where the Founder hath not thought fit to direct an Appeal, no Appeal lies, nay not to the Common Law Courts; the Founder having put all under the Judgment of the Viſitor, it muſt continue ſo: He might have ordered it, that the Rector ſhould continue only during the Pleaſure of the Viſitor, but now he hath left it to his Wiſdom according to the Statutes.

He is a Judge not only in particular by Appointment, but as he is Conſtituted a Viſitor in general; then in pleading of a Sentence of Deprivation, there is no Neceſſity of ſhewing the Cauſe, the Cauſe is not traverſable even in a Viſitation; ſo is *Raſtal* 1. 11 *Hen.* 7. 27. 7 *Rep. Kenne*'s Caſe, 9 *Edw.* 4. 24.

Form of Pleading inſtanced.

Suppoſe this Rectory had been a ſole Corporation: And not Part of a Corporation aggregate, as it is, Conſiſting of Rector and Scholars; and Dr. *Bury* had brought an Aſſize, and this Deprivation had been pleaded; it had been good to have ſaid that the *Viſitor certis de Cauſis ipſum adinde moventibus* had deprived him:

him: Every Thing that is traverſable muſt be expreſſed with Certainty, but the Cauſe need not be ſo in this Caſe.

Now 'tis ſtrange, that Pleading a Sentence without a Cauſe ſhould be good, and the finding of a Sentence in like Manner in a ſpecial Verdict ſhould not be good: If in Pleading it be not traverſable, 'tis the ſtrongeſt Argument, that the Cauſe is not to be inquired into; the having no Appeal doth not leſſen the Validity of the Sentence, it doth only ſhew the Rector's Place not to be ſo certain and durable, as in other Caſes they are, where Appeals are allowed.

The Caſe of *Caudrey* in the High Commiſſion Court is as ſtrong; a Sentence of Deprivation, no Appeals, and the Sentence found, and no Cauſe ſhewn, yet held good: 'Tis no Anſwer to ſay, that that was by the Eccleſiaſtical Law. How is it the Eccleſiaſtical Law, that a Man ſhall be concluded by one Sentence without Appeal? no, it was, becauſe it was by a Court that had Juriſdiction, and the Sentence was not the weaker, or the Cauſe of it more inquirable, becauſe there's no Appeal. *Caudrey's Caſe.*

'Twas by the Eccleſiaſtical Conſtitution, that the Commiſſioners had that Power, but that was eſtabliſhed by the Law of the Land, and ſo is the Viſitatorial Power; the one Authority is as much derived from the Law as the other.

Bird and *Smith*'s Caſe in *Moor's Rep.* Deprivation for not conforming to the Canons, held good in like Manner. *Bird and Smith's Caſe.*

As to the Caſe of *Coveney* in *Dyer* 209. and that in *Bagges*'s Caſe, 11 *Rep.* 99. they are the ſame as to this Matter, though in Two Books, an Aſſize becauſe no Appeal; he quotes Books for it, but upon a Peruſal they will not warrant the Diſtinction, for the Party is as much concluded in the one Caſe as in the other; 'tis reaſonable to ſuſpect that Caſe not to be Law, becauſe that is impracticable, which it is brought to prove. The Head of a College cannot maintain an Aſſize for his Office of Headſhip: He hath not ſuch an Eſtate as will maintain that Writ, therefore to give that Inſtance againſt us, is hard; the Rector hath no ſuch ſole Seiſin: The whole Body of the College have an Intereſt therein. He hath no Title to the Money in his own Right, till by Conſent they are diſtributed; and after ſuch Diſtribution, 'tis not the Rector's Money, but Dr. *Bury*'s; he is the only viſible Head of the Body indeed, but has no ſingle Right. *Coveney's Caſe.* *Bagges's Caſe.*

In *Appleford*'s Caſe the like Argument was drawn from this Caſe for a *Mandamus*, and inſiſted that he might have an Aſſize, but ſaid by the Lord *Hale*, that that was impoſſible; and in Truth, there's no Difference between this Caſe and that of a *Mandamus*, there was a Return that he was removed *pro crimine enormi*, and Appealed to the Biſhop of *Winton*, who confirmed the Amotion, and the particular Cauſe was not at all returned; and held good; becauſe there was a local Viſitor, who had given a Sentence, and all Parties were concluded by it; the ſame being done by the Power of that Government, which the Founder had thought fit to put them under. *Appleford's Caſe.*

Now

Now 'twas argued from hence, That this was an expreſs Caſe; if the Cauſe of the Deprivation be examinable in the Courts of Common Law, why not upon a *Mandamus* as well as in an Ejectment? The Lord *Hale* in the Caſe of *Appleford* took it for clear Law, That the Sentence was as binding as a Judgment in an Aſſize: He is made a Judge, and his Perſon particularly deſigned by the Founder, but he hath his Authority from the Law; and ſince the Founder hath truſted the Matter to his Diſcretion, 'tis not to be ſuſpected that he hath done, or will do otherwiſe than Right.

Preſumption is in Favour of Judicial Proceedings.

Then in the next Place 'twas argued, That there doth not appear any Injuſtice in the Sentence, and conſequently it ought to be preſumed Juſt; Credence is to be given to a Perſon that exerciſeth Judicial Power, if he keep within his Juriſdiction. The Law hath reſpect not only to Courts of Record and Judicial Proceedings in them, but even to all other Proceedings, where the Perſon, that gives his Judgment or Sentence, hath a Judicial Authority; and here's no Fault found in the Sentence; the Jury have not ſo much as found the Matter and Ground of it to be untrue in Fact, or inſufficient in Law.

Contumacy a good Cauſe of Deprivation.

Then 'twas urged, That the Cauſe of Deprivation here was Juſt, it being for Contumacy. If the Biſhop had Power to viſit in *June*, as he had, and was hindred by their ſhutting the Doors, whereupon he went away without doing any Thing, and came again in *July*, when he held his Viſitation, and they behaved themſelves Contumaciouſly, and refuſed to ſubmit to his Authority; this was *contra officii ſui debitum*; 'tis reaſonable that both Head and Members ſhould ſubmit to the Viſitor; Contumacy is a good Cauſe of Deprivation, and upon good Reaſon, becauſe it hinders an Inquiry into all other Cauſes: 'Twas held ſo in *Bird* and *Smith*'s Caſe, and in *Allen* and *Naſh*'s Caſe; *quia fuit refractarius*: Now tho' Contumacy be not one of the Cauſes mentioned in the Statutes, yet 'twas certainly contrary to their Duty; Turning their Backs upon the Viſitor, not Appearing upon Summons, Refuſing to be examined, was an Offence, and contrary to what the Statutes require. He is to inſpect the State of the College, and each Member's particular Behaviour; and now when the Viſitor comes to make ſuch an Inquiſition, and the Head or the Members withdraw themſelves, and will not appear to be examined, if this be not a good Cauſe of Deprivation, nothing can be, for that nothing elſe can ever be inquired into.

As for that Statute which refers to the Cauſes for which a Rector may be deprived, it doth not relate to a Deprivation in a Viſitation; but ſhews the Manner, how the College is to proceed, if he be guilty of ſuch Offences; they may complain at any Time to the Viſitor, if he waſtes the Revenues, or behave himſelf ſcandalouſly, and upon Requeſt will not reſign, and they may Article againſt him out of a Viſitation; but when he comes to execute his Power in his quinquennial Viſitation, he is not confined to pro-

ceed only upon the Information of the Fellows, but is to inquire into all the Affairs of the College, and may proceed to Deprivation, as he ſees Cauſe. Now Contumacy is a *cauſa* of a Forfeiture of his Office, which is ſubject to the Power of the Viſitor by the original Rules of the Foundation; and to evade or contumaciouſly to refuſe or deny a Submiſſion to that Power, is an Offence againſt the Duty of his Place, and conſequently a juſt Cauſe of Deprivation; ſo that upon the whole Matter, 'twas inferred and urged, that the Biſhop hath a Viſitatorial Power veſted in him to deprive the Rector without Conſent of the four ſenior Fellows. And 2. That the Juſtice of the Sentence is not examinable in *Weſtminſter-hall*. And 3. That if it were, and the Cauſe neceſſary to be ſhewn, here was a good one, an Affronting the very Power of viſiting, and ſetting up for Independency, contrary to the Will of the Founder; and therefore it was prayed that the Judgment ſhould be reverſed.

The three Concluſions.

On the other Side, 'twas argued by the Counſel with the Judgment, That this Sentence was void; that 'twas a mere Nullity; that this Proceeding had no Authority to warrant it; and that it being done without Authority, 'tis as if done by a mere Stranger; and whether it be ſuch an Act, or not, is examinable at Law; for that the Power of a Viſitor muſt be conſidered as a mere Authority or a Truſt, and it is one, or rather both, and then either way 'tis examinable; for every Authority or Truſt hath, or ought to have, ſome Foundation to warrant it; and if that Foundation which warrants it hath limited any Rules or Directions, by which it is to be executed, then thoſe Directions ought to be purſued; and if they are not, 'tis no Execution of the Authority given, or Truſt repoſed; and if not, 'tis a void Act, a mere Nullity, and conſequently 'tis that of which every Man may take Notice and Advantage.

Argument for the Defendant in Error.

Viſitatorial Power and Truſt.

Then 'twas ſaid, That it muſt be agreed that of a void Thing all Perſons may take Advantage, and conteſt it in a collateral Action, and that altho' it have the Form and Semblance of a Judicial Proceeding: And for this was cited the Caſe of the *Marſhalſea*'s, 10 *Rep.* 76. as a full Authority; the Reſolution was, That when a Court hath no Juriſdiction of a Cauſe, there all the Proceeding is *coram non judice*, and Actions lie againſt any Perſon pretending to do an Act by Colour of ſuch Precept or Proceſs, without any regard to its being a Precept or Proceſs; and therefore the Rule, *qui juſſu judicis aliquid fecerit, non videtur dolo malo feciſſe, quia parere neceſſe eſt*, will not hold, where there is no *judex*, for 'tis not of Neceſſity to obey him who is not Judge of the Cauſe; and therefore the Rule on the other ſide is true, *judicium a non ſuo judice datum, nullius eſt momenti*; and ſo was it held in the Caſe of *Bowſer* and *Collins*, 22 *Edw.* 4. 33. *per Pigot*, and 19 *Ed.* 4. 8. And therefore if the Court of *Common Bench* held Plea of an Appeal of Felony, 'tis all void; but it muſt be owned, that the mere erroneous Procedure of a Court which hath a General Juriſ-

Want of Juriſdiction infers a Nullity, and the Party grieved has his Action.

diction of the Subject Matter is not examinable in a Collateral Action, whether upon true Grounds, or not; and yet if it be a limited Juriſdiction, and thoſe Limits are not obſerved, even that is *coram non judice*; and holds with reſpect to Courts held by Authority of Law, which are much ſtronger than the Caſes of Power created or given by a private Perſon. A Sheriff is bound by Law to hold his Turn within a Month after *Michaelmas*, and he holds it after the Month, and takes a Preſentment at that Time, if that be removed into the *King's Bench*, the Party ſhall not anſwer it, but be diſcharged, becauſe the Preſentment was void, & *coram non judice*; for that the Sheriff at that Time had no Authority; and yet in that Caſe his Authority and Juriſdiction extended to the Perſon and Thing: The ſame Law for a Leet, unleſs Cuſtom warrants the Contrary, and then that Cuſtom muſt be purſued.

Limited Juriſdiction.

Sheriff.

Commiſſioners of Sewers.

The Commiſſioners of Sewers have a limited Authority; and if the Number of Perſons, or other Requiſites mentioned in their Commiſſion, be not purſued, what they do which exceeds it, is void; and yet they have a kind of Legiſlative Authority; ſo is it in Sir *Henry Mildmay*'s Caſe, 2 *Cro.* 336. and there they had an Authority both of Thing and Perſon, but did not obſerve the Rules preſcribed in the Gift of that Authority, according to the 23 *Hen.* 8. *cap.* 5. and no Reaſon could or can be given for that Reſolution, but that it was a particular limited Authority: And then, to apply this to the preſent Caſe, the Sentence in Queſtion can no more aggrieve the Defendant, than an Order pronounced or made by a *non Judex*, if it be not agreeable to the Power given by the Statutes; and this appears further from *Davis*'s *Rep.* 46. where the ſame Diſtinction is allowed.

Wrong Proceſs.

Nay, in ſome Caſes, the Award of a wrong Proceſs is void; as if by a Steward of a Manor Court, that a *Capias* ſhould iſſue, where the ſame doth not lie, but only an Attachment. *Turville* and *Tipper*'s Caſe, *Latch* 223. A Court of Pypowders hath Juriſdiction of an Action of the Caſe, yet if it holds Plea of Caſe for Slander, 'tis all void, tho' the Words were ſpoken within the Boundaries of the Fair, becauſe the Juriſdiction is limited; ſo that if the Thing, the Time, the Perſon, or the Proceſs, be not regarded according to the Authority given, 'tis all void, and an Advantage may be taken of it by any Body, where the Plaintiff Claims or makes his Demand by Colour of ſuch Act.

Pypowder Court

Notice of Conditions where to be taken.

'Twas further argued, That the Reaſon given in that Caſe of *Latch*, is, becauſe the Cuſtom which gave him his Authority, gave him Notice that ſuch Proceſs did not lie; and if any Man hath by our Law any Eſtate, Right, or Privilege, by any particular Means, he is bound to take Notice of all the Conditions and Qualifications annexed thereto: And the Reaſon is juſt, becauſe the ſame Means, by which he had Notice of the Benefit, gives him Notice of the reſtrictive Limitation and Penalty; and ſo was it held in the Caſe of *Fry* and *Porter*.

By our Law no Benefit can accrue to a Man by a Judgment

given on a Thing ariſing *extra poteſtatem Curiæ*, in caſe of a particular and limited Juriſdiction; as in the Caſe of *Kingſton upon Hull*, *March* 8. which held Plea of Debt upon a Bond made *extra Jur'*, *&c.* and a *Jud'*, and *Capias* executed, and an Eſcape, and no Action lay for the Eſcape, becauſe all was void, and *coram non Judice*: In the ſame Book, *March* 117, 118, *Dye* and *Olive*'s Caſe in Falſe Impriſonment, Plea that he was Serjeant at Mace belonging to a Court of Record, and that a Warrant was directed to him to Arreſt the Plaintiff *pro quodam Contemptu*; and held not good, becauſe not ſhewn, in what Action, and how within the Juriſdiction; and if not within it, 'twas *coram non judice*, and void; argued by *Rolls* and *Maynard*.

Where Juriſdiction to appear in Pleading.

Then 'twas argued, That this was a limited qualified Power; that the Viſitor was a Creature of the Founder's; and if it had been the Heir of the Founder, he had been as much bound and reſtrained by the Statutes, as a Stranger; and tho' the Law ſhould be agreed to be, as is pretended, that it appoints a Viſitor, yet ſtill (whether he be the Heir or Nominee of the Founder) he is an Officer only within the Limits and Rules of the Foundation and the Statutes made thereupon: As he hath a Viſitatorial Power only over this College, ſo he hath it only after the Manner in which 'tis given to him.

Viſitor a Creature of the Founder.

If the Founder had made no particular Viſitor, but yet had appointed that the ſame ſhould be viſitable at ſuch a Time, and in ſuch a Form, he himſelf had been bound by theſe Rules; and if he would have been ſo confined, with much more, or at leaſt with the ſame Reaſon, ought his Nominee; for *cujus eſt dare, ejus eſt diſponere*; and every Argument which hath been urged for the Rector's being ſubject to the Rules of the Foundation, may likewiſe be applied to that of the Viſitor: He that made the Viſitor may reſtrain, ſhape, and modify the Power which he gives him: He might have made him Viſitor only once in his Life, or only upon Requeſt, and have left all other Juriſdiction to the Rector and Fellows,

His Power modified.

But further, here he is found to be Viſitor only *ſecundum formam ſtatut' & vigore ſtatut'*, and to execute thoſe Statutes; and that which makes him a Viſitor, makes him ſuch thus and thus qualified, and no otherwiſe; whatſoever Power or Authority the Name or Office of a Viſitor may import *ex vi termini*, no Man can ſay but this Viſitor is controled by the Statutes, which make him ſo: Now had there been no Statutes, he had never been Viſitor; then theſe Statutes making him a Viſitor upon particular Terms and Conditions, Times and Occaſions, *extra* theſe Terms and Conditions he is no Viſitor at all; this ſeems plain and natural: So that if he exceeds the Bounds preſcribed to him as Viſitor, he doth not act as Viſitor; for all Powers, Authorities, and Juriſdictions, eſpecially ſuch as are created by private Perſons, muſt be executed according to the expreſs Inſtitution or plain Meaning of the Party that created them, and according to the Circumſtances, with which he hath circumſcrib'd them: So is the Rule

And controled by the Statutes.

in

in *Berwick*'s Caſe, 5 *Rep.* 94. and 1 *Inſt.* 113. and 258. An Executor is an Officer or Perſon intruſted, which is taken Notice of by the Law, yet in his Creation he may be limited *quoad* the Eſtate in one Country, or *quoad* one Particular, and he can't intermeddle any further; but Adminiſtration ſhall be granted as to the reſt.

Limited Executor.

Viſitor not a Court.

Then 'tis obſervable, That this Statute Viſitor is not a Court of Record, nor any Court at all, but rather like an Arbitrator under certain Directions; he can neither meddle at another Time, or with other Matters, or in other Manner, than what is preſcribed. But admitting it a Sort of Judicature, here's no Appeal or Writ of Error, or Prohibition or *Mandamus* lies; nay, the Viſitor himſelf cannot relieve againſt his own Sentence, or reſtore the Party deprived the next Day; but the Place being vacant, a Right of Election accrues to the Fellows; 'tis therefore unreaſonable to ſuppoſe him not reſtrained, or that his Acts, if exceeding the Limits and Rules ſet him, ſhall be concluſive and binding.

Lay-Hoſpitals.

This is like a Lay-Hoſpital, 'tis not a Religious Body, tho' ſome call it mixt; and in caſe of Temporal Lay-Offices, there muſt be ſome Remedy at Law, as is 13 *Rep.* 70. ſo is *Dyer* 209. and 3 *Inſt.* 340. Where no Appeal is allowed, another Examination muſt be admitted; and thus ſeems the 8 *Aſſiſ. pl.* 29. tho' it hath been quoted on the other ſide: If the Warden of an Hoſpital be irregularly deprived, he ſhall have his Remedy at Law; and 13 *Aſſiſ.* 2. to the ſame Effect: *Bagges*'s Caſe, 11 *Rep.* repeats the ſame Caſe, which ſhews *Coke*'s Opinion to concur with it; and tho' an Aſſize doth not properly lie, yet the Meaning is, he ſhall have Relief, *i. e.* ſuch Suit at Law as is proper to his Caſe: The ſame Diſtinction is allowed in Dr. *Sutton*'s Caſe, *Latch* 229. And that a Remedy is given by the Law in this Caſe of a Temporal Property, ſeems to be plainly affirmed in the Statute of 24 *H.* 8. *cap.* 12. And further, Tho' ſtrictly and properly it were not of Common Law Conuſance, yet it falling incidently to be a Queſtion upon Trial of a Title, the Court before whom that Suit depends muſt examine that Incident; as in caſe of an Iſſue, lawfully joined in Marriage or not, the Trial ſhall be by Certificate of the Ordinary; but if it be a Queſtion upon the Trial of a Title to Land, the Matter ſhall be tried and judged without Certificate.

Law favours Appeals, &c.

The Wiſdom of our Law hath been ſuch, as very rarely to truſt any of the Courts of Juſtice with the final Determination of Matters of Law in the firſt Inſtance; and 'twould be ſtrange that this Caſe of a Viſitor ſhould ſtand ſingle by it ſelf. Beſides, to prevent a Failure of Juſtice, the Law doth of Neceſſity admit of ſeveral other Proviſions and Methods of Examination or Trial, than what the ſubject Matter or Perſon would properly in their own Nature require, eſpecially in Point of Remedy and Relief, as appears in *Dormer*'s Caſe, 5 *Rep.* 40. and 1 *Inſt.* 54. 2 *Roll's Abridg.* 587. now here is no other Remedy, nor other way of Trial,

for Deprivation is not triable by Certificate, but only in Caſe of an Eccleſiaſtical Perſon.

As to the Objection from *Appleford*'s Caſe, *Sid.* 71. there that Writ was fully anſwered, and they could not Examine into the Truth and Falſity of that Anſwer, but muſt leave the Party to his Action; and it doth not thence follow, That in an Action there's no Remedy: But the ſtrongeſt Objection is, that in pleading a Deprivation, you need not ſhew the Cauſe, and it muſt be taken for juſt and good, as *Moore* 781. *Jones* 393. *Moore* 228. 2 *Roll's Abridg.* 219. 9 *Edw.* 4. 25. that you need only ſhew by whom: All theſe ſtand upon the ſame Foundation, they were by Authority Eccleſiaſtical, and muſt ſtand till Repealed; and even thoſe Caſes of the High Commiſſion Court, they were by the Courſe of the Eccleſiaſtical Law, which was ſaved to them by the Proviſo in 1 *Eliz.* and therefore ſhall be intended ſo, till the contrary appear: And even there 'twas *debito modo privatus*, which implies all due Requiſites; but here the whole is diſcloſed, upon a ſpecial Verdict; 'tis not found here, that he was duly deprived; but that he was deprived after ſuch a Manner, which, if it appears to have been without Authority, muſt be null: As to *Ley*'s Opinion in *Davis* 47. that a Sentence of Deprivation, in caſe of a Donative by an Ordinary, was effectual in Law, till Reverſed; that's not Law, for 'twas all *coram non judice*. *Bro. Præmunire*, 21 *Nat. Br.* 42. the Ordinary cannot viſit a Benefice Donative. *Appleford's Caſe.*

Then they Object, That this is an Eleemoſynary Intereſt, and the Rector took it under thoſe Terms of Subjection to ſuch a Viſitor: But that is the Queſtion, what thoſe Terms are? And the Conſequences of ſuch an Opinion may be dangerous to the Univerſities, thoſe Nurſeries of Learning and good Manners. 'Tis to make them too precarious and dependent upon Will.

And as to the Pretence that the Land was the Founder's, and he might diſpoſe of it at pleaſure, it was anſwered, that before the Gift, the Lands and the Profits and the Ownerſhip were all ſubject to the Common Law, and the Owner could not give ſuch a Power as is pretended, no more than he could oblige all Differences about his Eſtate to be finally determined by a particular Perſon and his Heirs or Succeſſors: No Abſolute Power can be fixed in this Nation by Cuſtom, but rather than the ſame ſhall be allowed, the Cuſtom ſhall be void. 1 *Inſt.* 14. *Davis* 32. 2 *Roll's Abridg.* 265. Copyholds were anciently at mere Will and Pleaſure, but the Lord is now obliged to and by certain Rules: By our Law the Power of Parents over Children is qualified and reſtrained; 'tis no Argument, to ſay that the Viſitor comes *in loco* or *vice fundatoris*, for the Alienation and the Statutes did oblige even himſelf: And though perhaps, if no Statutes had been made, his Viſitatorial Power had been much larger, yet ſince 'tis limited to once in five Years, and his Acts to be with others Conſent, 'tis as much as if he had given the College a Privilege of Exemption by Words expreſs from any Viſitation, at all other Times, and in all other Manners, than thoſe which are mentioned. Then was *Powers are qualified by Law.*

Cited the Caſe of *Terry* and *Huntington*, in *Scaccar' Trin.* 20 *Car.* 2. in *Hardres's Rep.* 480. before Sir *Matthew Hale*: Trover for Goods ſeized by Warrant of the Commiſſioners of Exciſe; the *Quære* was, when they adjudged low Wines to be ſtrong Wines perfectly made, upon 12 *Car.* 2. *cap.* 23. whether it might be drawn in Queſtion again by an Action in *Weſtminſter-hall*; and held it might, though they were Judges, and though the Statute gave an Appeal; and the Reaſons given there ſeem to reach this Caſe, becauſe they had a ſtinted limited Juriſdiction, and that implies a Negative, *viz.* that they ſhall not proceed at all in any other Caſes; and that ſpecial Juriſdictions might be and frequently were circumſcribed, 1. With reſpect to Place, as a Leet or a Corporation Court; 2. With reſpect to Perſons, as in the Caſe of the *Marſhalſea*; 3. With reſpect to the ſubject Matter of their Juriſdiction: And if Judgment be given in another Place, or upon other Perſons, or about other Matters, that all was void and *coram non judice*; and though it was objected, that ſtrong Wines were within their Juriſdiction, and that 'twas only a Miſtake in their Judgment; yet it appearing upon the ſpecial Verdict, that they were low Wines, the Action was held maintainable; this is ſo plain, it needs no Application.

Commiſſioners of Exciſe.

Then it was argued, that this Sentence was void, 1. Becauſe there was no Authority to viſit at this Time, there having been a Viſitation by the Commiſſary within five Years before; that no Words in the Statute make him a Viſitor generally, but only *ſecund' ſtat'*, i. e. upon Requeſt, or without Requeſt *a quinquennio in quinquennium ſemel*; now here's no Requeſt found; then the Act of Dr. *Maſters* as Commiſſary is an Exerciſe of the Viſitor's Office; *Colmer's* Appeal was to the Biſhop as Viſitor; *Semel* implies a Negation of having it more frequent; according to the Grammar it ſignifies once and not oftner, or once for all: If *Semel* comes alone, without any other Particle, then 'tis but once, and if with another, as *ne Semel*, 'tis not once, or never; and the *liceat Semel* can have no other Conſtruction; it cant' mean once at the leaſt, as was argued below, eſpecially as oppoſed to Requeſt: And no Argument can be drawn from the Neceſſity of frequent Viſitations, for that Evils are not to be preſumed; and over inferior Members there's a Power in the Rector and four Seniors: Now Dr. *Maſters* was not requeſted by the College, nay, they proteſt againſt it in ſome Degree, *i. e.* ſo far as relates to *Colmer's* Reſtitution; the Oath of a Scholar being againſt Appeals: And the Oaths and the Contents of them are to be deemed Part of their Conſtitution: But ſuppoſing that Buſineſs might be examined as a Thing proper for Conſideration, when an Inquiry is made into the State of the College; and the Admiſſion, Continuance, and Removal of the Members is certainly one Article of ſuch Inquiry, yet that muſt be done in Viſitation, and as Viſitor, for there's no other Power found in the Verdict but that.

That this Sentence is void, 1. For want of Authority at the Time.

2. Admit-

2. Admitting that no Action of Dr. *Maſters* to be Viſitation, yet this Sentence is void, becauſe it held above three Days, and the Statutes ſay, after three Days it ſhall be taken *pro terminat' & diſſolut'*. On the 16th of *June* he comes with Intention to viſit, doth an Act proper to his Office and Buſineſs, examines the Summoner about the Citation; if he had come and only examined and made no Decree, it had been a Viſitation; and either 'tis a *quinquennial* one of it ſelf, or it is a Commencement of one, and either one way or other it makes the Deprivation void; 'tis afterwards entred as a Viſitatorial Act; *Eundem actum pro parte hujuſmodi negotii Viſitationis haberi decrevit*, and then he adjourns; 'tis no Argument to ſay that he was hindred, for he might have proceeded *in abſentia*; and if the 16th of *June* be tacked to it, 'tis longer than the Time: There needed no formal Adjournment, for that he is Authorized to proceed in a Summary way; 'tis no ſuch Abſurdity to call that a Viſitation which was in ſome ſort hindred, ſince notwithſtanding the Obſtruction, ſome Acts were done, and more might have been by adjourning to another Place. 2. Becauſe the Viſitation held above three Days.

3. Here was no ſuch Cauſe as could warrant a Deprivation: it was not one of the Cauſes mentioned in the Statues, which are not Directions merely, but they are the conſtituent Qualifications of the Power; and Contumacy is none of the Cauſes; nay, here is no Contumacy at all: The Offence of the Suſpended Fellows was only a Miſtake in their Opinions, and the Doctor's was no more; and 'tis not a Contumacy for refuſing to anſwer to or for any Crime within the Statutes, for there was none of the Crimes mentioned in the Statutes laid to the Charge of the Rector; if the Crime charged had incurred Deprivation, perhaps Contumacy might be Evidence of a Guilt of that Crime, and ſo deſerve the ſame Cenſure; but Contumacy in not conſenting to a Viſitation can never be ſuch, eſpecially when the Conſenting to a Viſitation is not required under Pain of Deprivation. 3. Not a ſufficient Cauſe of Deprivation.

4. Admitting the Viſitor legally in the Exerciſe of his Office; that here was Cauſe of Cenſure; that the Cauſe or Crime was deſerving of that Puniſhment which was inflicted; that Deprivation was a congruous Penalty for ſuch an Offence: Yet 'twas argued, That this Sentence was void; for that the Viſitor alone was in this Caſe *minus competens judex*, becauſe his Authority was particularly deſigned to be exerciſed with the Conſent of others, which was wanting in this Caſe: This was the ſame as if it had required the Concurrence of ſome other Perſons *Extra Colleg'*, then that ſuch a Concurrence was neceſſary, appears from the Words of the Statute, his Meaning ſeems plain upon the whole, to require it. A greater Tenderneſs is all along ſhewn to the Rector, than to the Scholars, 'tis *ſine quorum conſenſu irrita erit hujuſmodi Expulſio & vacua ipſo facto*; and the Sentence it ſelf ſhews it neceſſary, becauſe it affirms it ſelf to be made with ſuch Conſent; and it cannot be thought that the Rector ſhould be deprivable without their Conſent, when the meaneſt Scholar could not. 4. Viſitor alone not a competent Judge.

Then

A Suſpenſion does not make a Vacancy.

Then here's no ſuch Conſent, for 'tis not of the four Seniors, but of the four Seniors not ſuſpended; now this doth not fulfil the Command of the Statute, for the Suſpenſion doth not make them to be no Fellows, a Suſpended Fellow is a Fellow though Suſpended; a Suſpenſion makes no Vacancy; the Taking off of the Suſpenſion by Sentence or by Effluxion of Time, doth make them capable of acting ſtill, without the Aid of any new Election, and they are in upon their old Choice, and have all the Privileges of Seniority and Precedency as before.

Suſpenſion what.

If they ceaſed to be Fellows by the Suſpenſion, then they ought to undergo the *Annum probationis* again, and to take the Oaths again: In caſe of Benefices or Offices Religious or Civil, Eccleſiaſtical or Temporal, 'tis ſo; a Suſpenſion in this Caſe is only a Diſabling them from taking the Profits during the Time it continues: And 'tis no Argument to ſay, That there Concurrence was not neceſſary, for that they had withdrawn themſelves, and were guilty of Contumacy; for that a Man guilty of Contumacy might be preſent; if withdrawn from the Chapel, he might be in the College, or in the Univerſity: And 'tis not found that they were abſent; and then their Conſent not being had, the Sentence was void and null, and conſequently no Title found for the Leſſor of the Plaintiff in the Action below.

Reply for the Plaintiff in Error.

It was replied in Behalf of the Plaintiff, much to the ſame Effect as 'twas argued before, and great Weight laid upon the Contumacy, which hindred the Obſervance of the Statutes; that by allowing ſuch a Behaviour in a College, no Will of the Founder could be fulfilled, no Viſitation could ever be had; and all the Statutes would be repealed or made void at once; that tho' this Crime was not mentioned, 'twas as great, or greater than any of the reſt; that here was an Authority, and well executed and upon a juſt Cauſe, and in a regular Manner, as far as the Rector's own Misbehaviour did not prevent it; and therefore they prayed that the Judgment might be reverſed: And upon Debate the ſame was reverſed accordingly.

Judgment reverſed.

Error from *B. R.* lies either to the Exchequer Chamber, or to Parliament.

But from the Court of Exchequer, it lies not immediately to Parliament.

Note, That in this Caſe there was one Doubt conceived before, and another after this Hearing: The firſt was, If a Writ of Error lay in Parliament immediately upon a Judgment in the *King's Bench*, without firſt reſorting to the *Exchequer Chamber*; but upon peruſing the Statute which erects that Court for Examination of Errors, it appeared plainly that that Act only gives the Election to the Party agrieved to go thither; that it did not take away the old Common Law Method of Relief in Parliament, and ſo hath the Practiſe been; but upon Judgments in the *Exchequer Court*, the Writ of Error muſt firſt be brought before the Lord Chancellor, and cannot come *per ſaltum* into Parliament, becauſe the Statute in that Caſe expreſly ordains, That Errors in the Court of *Exchequer* ſhall be examined there; and ſo held in the Caſe of the Earl of *Macclesfield* and *Groſvenor*.

The other Doubt was raiſed by a Motion in *B. R.* for the Court to give a new Judgment upon the Reverſal above; and inſiſted on, that it ought ſo to be, as was done in the Caſe of *Faldo* and *Ridge*, *Yelv.* 74. entred *Trin.* 2 *Jac.* 1. *Rot.* 267. Treſpaſs, and ſpecial Plea, and Judgment in *B. R.* for the Defendant; and upon Writ of Error in the *Exchequer Chamber* the Judgment was Reverſed; and upon the Record returned into the *King's Bench*, they gave Judgment that the Plaintiff ſhould recover, contrary to the firſt Judgment; for otherwiſe, they ſaid, the Law would prove defective; and a Precedent was ſhewn in *Winchcomb's* Caſe, 38 *Eliz.* where the ſame Courſe was taken; and the like Rule was made *Mich.* 1 *W. & Mar.* upon the Reverſal of the Judgment *inter Claxton* verſ. *Swift*, which is entred *Mich.* 2 *Jac.* 2. *B. R. Rot.* 645. the like between *Sarsfield* verſ. *Witherley*. Carth. 319, 320. Argument and Precedents that the King's Bench is to give a new Judgment upon the Reverſal.

'Twas argued on the other ſide, That the Court which reverſes the Judgment ought to give the new Judgment, ſuch as ought to have been given at firſt, that in the *Exchequer Chamber* it may be otherwiſe, becauſe they have only Power to affirm or reverſe; yet in the Caſe of *King* and *Seutin*, the *Exchequer Chamber* gave a new Judgment, tho' they cannot inquire of Damages: And that is a Kind of Execution which muſt be in *B. R.* In *Omulkery's* Caſe, 1 *Cro.* 512. and 2 *Cro.* 534. the Court here ſends a Mandatory Writ to command them in *Ireland* to do Execution there, *St. John* verſ. *Cummin*, *Yelv.* 118, 119. 4 *Inſt.* 72. If Writ be abated in *C. B.* and Error brought in *B. R.* and the Judgment be reverſed, ſhall proceed in *B. R.* and 1 *Rolls* 774. to the ſame Effect, *Green* verſ. *Cole*, 2 *Saund.* 256. The Judges Commiſſioners gave the new Judgment. 'Tis true, in *Dyer* 343. the Opinion was that he was only reſtored to his Action, and then Writs of Error were not ſo frequent. The Judgment may be erroneous for the Defendant, and yet no Reaſon to give a Judgment for the Plaintiff, as in *Slocomb's* Caſe, 1 *Cro.* 442. the Court gave a new Judgment for the Defendant; therefore it properly belongs to the Court, which doth examine the Error, to give the new Judgment; the Record is removed, as *Fitzh. Nat. Brev.* 18, 19. on falſe Judgment in Ancient Demeſne; 38 *Hen.* 6. 30. and *Griffin's* Caſe in Error on a *quod ei deforceat*, in 2 *Saunders* 29, 30. new Judgment given here. In the Caſe of *Robinſon* and *Wolley* in 3 *Keble* 821. Ejectment, ſpecial Verdict, Judgment reverſed in the *Exchequer Chamber*, and they could never get Judgment here, the Court of *Exchequer Chamber* not having given it: And in the principal Caſe, after ſeveral Motions in the Court of *King's Bench*, the *Remittitur* not being entred there, a Motion was made in Parliament upon this Matter, and a new Judgment was added to the Reverſal, that the Plaintiff ſhould recover, *&c.* Argument *contra*. The new Judgment given in Parliament.

The Caſe of Dr. Bentley *Maſter of* Trinity College *in* Cambridge, *and the Biſhop of* Ely *Viſitor there, adjudged in Parliament* G. 2. *is to be conſulted upon this Doctrine. There was a great Number of Articles libelled againſt the Doctor; their Lordſhips awarded Prohibition to ſtand as to ſome, and Conſultation as to others of them.*

Dr. William Oldis, Plaintiff, verſus *Charles Donmille, Defendant.*

Error from the Exchequer Chamber. Declaration in Prohibition. Court of Honour.

WRIT of Error to Reverſe a Judgment in the Court of *Exchequer*, affirmed upon a Writ of Error before the Lord Chancellor, *&c.* The Caſe upon the Record was thus; *Donmille* declares in the *Exchequer in placito tranſgr. & contempt'*, *&c.* for a Proſecution *contra regiam prohibit'*, and ſets forth *Magna Charta*, that *nullus liber homo*, *&c.* that the Plaintiff is a Freeman of this Kingdom, and ought to enjoy the free Cuſtoms thereof, *&c.* that the Defendant not being ignorant of the Premiſſes, but deſigning to vex and aggrieve the Plaintiff, did *in Curia militari Henrici Ducis* Norfolk' *coram ipſo Henrico Com' Mareſchal'* Exhibit certain Articles againſt the Plaintiff, *&c.* that Sir *Henry St. George Clarencieux* King at Arms, was, and is, King at Arms for the *Southern*, *Eaſtern* and *Weſtern* Parts of the Kingdom, *viz.* from the River of *Trent verſus Auſtrum*, and that the Conuſance, Correction, and Diſpoſition of Arms and Coats of Arms, and ordering of Funeral Pomps time out of mind did belong to him within that Province; and that the Plaintiff having Notice thereof, did, without any Licence in that Behalf had and obtained, Paint, and cauſe to be Painted, Arms and Eſcutcheons, and cauſed them to be fixed to Herſes that he provided, and lent Velvet Palls for Funerals; that he painted divers Arms for one *Berkſtead*, who had no Right to their Uſe at the Funeral, and did lend a Pall for that Funeral, and paint Arms for *Elizabeth Godfrey*, and marſhalled the Funeral, and the like for *Sprignall*: And that he had publickly hanging out at his Balcony Eſcutcheons painted, and Coaches and Herſes, and other Publick Proceſſions of Funerals, to entice People to come to his Houſe and Shop for Arms, *&c.* That the Defendant compelled the Plaintiff to appear and anſwer the Premiſſes, *&c.*

Defendant's Plea. Court before whom held.

The Defendant *in propria perſona ſua venit & dicit*, That the Court of the Conſtable and Marſhal of *England* is an ancient Court, Time out of Mind, and accuſtomed to be held before the Conſtable of *England* and the Earl Marſhal of *England* for the Time being, or before the Conſtable only when the Office of Earl Marſhal is Vacant; or before the Earl Marſhal only when the Office of Conſtable is Vacant; which Court hath Time out of Mind had Conuſance of all Pleas and Cauſes concerning Arms, Eſcutcheons, Genealogies, and Funerals within this Realm, and that no other Perſon hath ever intermeddled in thoſe Pleas or Affairs, nor had or claimed Juriſdiction thereof; and that the Suit complained of by the Plaintiff was proſecuted in the ſaid ancient Court of and for Cauſes concerning Arms, Eſcutcheons, and Funerals: That by the 13 *Rich.* 2. 'twas enacted, that if any Perſon ſhould complain of any Plea begun before the Conſtable and Marſhal, which might be tried by the Common Law, he ſhould have a Privy

Its Juriſdiction as to Arms and Funerals, *&c.*

Seal without Difficulty to be directed to the Conſtable and Marſhal to ſuperſede that Plea, till diſcuſſed by the King's Counſel, if it belongs to that Court or to the Common Law, *prout per Statut' ill' apparet*, and that the ſaid Court Time out of Mind hath been *tant' honoris & celſitudinis*, that it was never prohibited from holding any Pleas in the ſame Court *aliter vel alio modo quam juxta formam Statut' præd' ; Et hoc parat' eſt verificare. Unde non intendit quod Curia hic placitum præd' ulterius cognoſcere velit aut debeat, &c.*

The Plaintiff demurs, and the Defendant joins.

From the *Exchequer Court* this was adjourned *propter difficultatem* into the *Exchequer Chamber*, and afterwards by Advice of the Judges there, the Court gave Judgment for the Plaintiff, which was affirmed by the Chancellor and Treaſurer, *&c.* Judgment below for the Plaintiff.

And now it was argued on the Behalf of the Plaintiff in the Writ of Error, that this Judgment was erroneous, and fit to be reverſed. Argument for Plaintiff in Error.

And firſt, to maintain the Court as ſet forth, 'twas inſiſted on 1. That when there was a Conſtable and Marſhal, the Marſhal had equal Power of Judicature with the Conſtable, as each Judge hath in other Courts. 2. That the Conſtable had in that Court Power of Judicature alone, when there was no Marſhal. And 3. That the Marſhal had the like, when there was no Conſtable. That the Conſtable and Marſhal have equal Power, *&c.*

That they had both equal Power of Judicature, appeared by all their Proceedings ; by their Libels or Bills, in the Caſe of *John Keightley*, Eſq; againſt *Stephen Scroop :* The Libel is, *In the Name of God, Amen. Before you my Lords the Conſtable and Marſhal of* England *in your Court of Chivalry, and prays that the ſaid* Stephen, *by their Sentence definitive, may be puniſht.* 1 *pars Pat.* 2 *Hen.* 4. *m.* 7. And the ſame *Stephen* libelled againſt *Keightley* to the thrice Honourable Lords the Conſtable and Marſhal of *England.* So the Libels were directed to both, and both ſat judicially. Precedents.

The ſame appears by the Sentence or Judgment given in that Court : *Bulmer* libelled againſt *Bertram Uſau coram Conſtabulario & Mareſchallo, qui duellum inter partes allocaverunt & aſſignaverunt locum & tempus. Rot. Vaſcor'* 9 *H.* 4. *m.* 14. It doth likewiſe appear to be ſo by the Appeals from their Judgments to the King ; they are both ſent to, to return the Rolls of their Judgments. *Rot. Clauſ.* 20 *Edw.* 1. *m.* 4. In the Appeal brought by Sir *Robert Groſvener* againſt *Richard Scroop*, 'tis upon the Sentence given by the Conſtable and Marſhal in the Suit before them concerning a Coat of Arms. *Rot. Clauſ.* 12 *Rich.* 2. *m.* 4. Appeal by *Bond* verſ. *Singleton*, 'tis in a Cauſe of Arms in our Court before our Conſtable and Marſhal, wherein Sentence was given by them. 1 *pars Pat.* 17 *Rich.* 2. *m.* 12. Thus it appears by a Commiſſion for the Execution of the Office of Conſtable of *England*, *Committimus vobis officium hujuſmodi Conſtabularii ad querelam* Thomæ Moor *in hac parte una cum* Edmundo de Mortimore *Mareſchallo* Angliæ *audiendum. Secunda pars Patent'* 48 *Edw.* 3. *m.* 20. *in dorſo.* As alſo by Precedents.

a Claim

a Claim at the Coronation of *H.* 5. before *Beauchamp* Earl of *Warwick* then Lord Steward, *John Mowbray* Earl Marſhal, Son to the then Duke of *Norfolk*, claimed under a Grant in 20th of *Rich.* 2. of the Office of Earl Marſhal of *England*, to hold Court with the Conſtable, and to hold Pleas before them; and Copies of theſe Precedents were ſaid to have been ready in Court.

Precedents.

Further, to prove the joint Authority, were cited ſeveral of our old Books, 48 *Edw.* 3. *fol.* 3. in a Caſe of Debt upon an Indenture by which *P.* was retained by the Defendant, with two Squires of Arms for the War in *France*: *Belknapp* ſaid, of ſuch Matter this Court cannot have Conuſance, but 'tis Triable before the Conſtable and Marſhal. In the Caſe of *Pountney* and *Bourney* 13 *Hen.* 4. 4. the Court of *King's Bench* call it the Court of the Conſtable and Marſhal: And in 37 *H.* 6. 3. upon another Occaſion, *Priſot* ſaid, this Matter belongs to the Conſtable and Marſhal: And *Coke* 4 *Inſt.* 123. ſays that they are both Judges of the Court: And that the Conſtable ſometimes gave Sentence, is no Argument that the Marſhal was no Judge with him; it only proves him the Chief, who in moſt Courts doth uſually give the Rule: Nor is the Earl Marſhal's Receiving Writs from the Conſtable to execute his Commands, any Argument that he ſits there only as a Miniſterial Officer, and not as a Judge; for he may be both; as in many Corporations Mayors are Judges of the Court, and yet have the Cuſtody of their Gaols too; and ſo have the Sheriffs of *London* their Compters, tho' they ſtrictly are Judges of their ſeveral Courts.

There are Judges who alſo Miniſterially execute their Judgment.

That the Conſtable alone,

2. During the Vacancy of the Earl Marſhal's Office, the Conſtable alone had the Judicature; as in 11 *H.* 7. on *Holyrood-day*, the Earl of *Darby* being then Conſtable of *England* ſat and gave Judgment alone in a Cauſe between Sir *Thomas Aſhton* and Sir *Piers Leigh* upon a Coat of Arms: But this needs no Proof, ſince 'tis contended on the other ſide, that the Court doth belong only to the Conſtable.

And Martial alone may ſit, and give Judgment. Precedents.

3. 'Twas argued, that the Earl Marſhal hath ſat alone and given Judgment; and to prove that, it was ſaid, this Court was held when there was no Conſtable, before *Thomas Howard*, Duke of *Norfolk*, Lord High Treaſurer and Earl Marſhal of *England*, who died 16 *H.* 8. and next after him, before *Charles Brandon*, Duke of *Suffolk*, then Earl Marſhal, who died 37 *H.* 8. after him, the Court was held and Sentences given by *Thomas Howard*, Duke of *Norfolk*, who died in 1512. and after him, in the 30 *Eliz.* the Earl of *Eſſex* ſat as Earl Marſhal, and heard and determined Cauſes judicially, and the chief Judge ſat then as Aſſiſtant with him in Court, and then after the Death of the Earl of *Eſſex*, it was in Commiſſion to my Lord Treaſurer *Burleigh* and others, and then the great Caſe of Sir *F. Mitchell* was heard and determined, at which ſeveral Judges aſſiſted, and the Sentence of Degradation was executed upon him, 26 *April*, 1621.

and then was cited the Caſe of *Pool* and *Redhead* 12 *Jac.* 1. 1 *Roll's Rep.* 87. where 'twas held, that the proper Remedy for Fees of Knighthood was to ſue to the Earl Marſhal; and *Coke* ſays in the ſame Caſe, the Common Law does not give Remedy for Precedency, but it belongs to the Earl Marſhal: And ſince that in *Parker's* Caſe, which was 20 *Car.* 2. *Syd.* 353. the Earl Marſhal was agreed to have the abſolute Determination of Matters of Honour in the Court of *Chivalry*, as much as the Chancellor hath in Matters of Equity: And the Error on the other Side, was occaſioned by not diſtinguiſhing between the Ancient Juriſdiction of this great Court at the Common Law, and the Juriſdiction given to the Conſtable and Marſhal under thoſe Names by Statute: For the latter cannot be executed by one alone; and that Diſtinction anſwers the Authority in 1 *Inſt.* 74. which grounded the Miſtake, that there is no Court of *Chivalry*, becauſe there's no Conſtable; whereas the Reaſon why in Sir *Francis Drake's* Caſe the not conſtituting of a Conſtable ſilenced the Appeal, was from the 1 *H.* 4. *cap.* 14. which orders all Appeals of Murder committed beyond Sea to be before the Conſtable and Marſhal by Name: But the Ancient Juriſdiction of this Court by Preſcription, wherein both the Conſtable and Marſhal were Judges ſeverally or together, and which each of them did and could hold alone, remains ſtill as much in the Earl Marſhal alone, as it ever was in him and the Conſtable.

1 Lev. 230.

Anſwer to Lord *Coke's* Authority.

Then it was argued that no Prohibition lay to this Court, becauſe none had ever been granted, and yet greater Occaſions than now can be pretended, by Reaſon of the large Juriſdiction, which this Court did in ancient Time Exerciſe; many Petitions were frequently preferred in Parliament, complaining of the Incroachments of this Court in *E.* 1. *E.* 3. *R.* 2. *H.* 4. and *H.* 6. Time, as appears in 4 *Inſt.* 125. 2 *H.* 4. Num. 79 and 99. 1 *Roll's Abridg.* 527. and yet no Prohibition granted or moved for; which according to *Littleton's* Text is a very ſtrong Argument, that it doth not lie.

That no Prohibition lies to this Court.

The Statute of 13 *R.* 2. 2. is an Argument againſt it, becauſe after ſeveral Complaints of the Incroachments of this Court, another Remedy is given, which had been needleſs, if this had been legal: Nay, it ſhews the Opinion of the Parliament, that there was no other way of Relief: And ſoon after the Making of this Statute, in the ſame Reign two Privy Seals were ſued upon it: In the Caſe of *Poultney* and *Bourney*, 13 *H.* 4. 4. 5.

1. Reaſon.

Beſides, this might be grounded on the Antiquity and Greatneſs of this Court: For as to the ſubject Matter of it, 'tis by Preſcription a Court for determining Matters of Honour, to preſerve the Diſtinction of Degrees and Quality, of which no other Courts have Juriſdiction; and the Right and Property in Honours and Arms is as neceſſary to be preſerved in a Civil Government, as that in Lands or Goods. Then 'twas urged that this Court hath Juriſdiction even of Capital Offences, its Extent is large, 'tis throughout the Realm, even in Counties Palatine, even beyond

2. Reaſon.

the Seas; its Manner of proceeding is different, in a Summary way by Petition, its Trial of Fact may be by Duel, as in 4 *Inſt.* 125. though the Statutes of *H.* 8. impower Commiſſions for Trial of Treaſons committed beyond the Seas, yet this Court doth and may ſtill take Conuſance of ſuch Cauſes. 4 *Inſt.* 124. Its Sentences are only reverſable by and upon Appeal to the King, no Writ of Error or falſe Judgment lies upon any of them, which ſhews the Greatneſs of the Court, and the Difference of its Juriſdiction from other Courts; which may be ſome of the Reaſons, why no Prohibition was ever granted to it, and why the Parliament of *R.* 2. gave the Remedy of a Privy Seal: Wherefore it was prayed that the Judgment ſhould be reverſed.

Argument for Defendant in Error. Three Points.

On the other Side it was argued by the Counſel in Behalf of the Plaintiff in the Original Action, that this Judgment ought to be affirmed; and it was after this Manner, there ſeem three *Quæries* in the Caſe; 1. If any Prohibition lies to that Court; 2. If any Cauſe here for a Prohibition; and, 3. If there be any ſuch Court as that before the Earl Marſhal; but another Doubt was raiſed, whether any of theſe Queſtions could be ſuch upon this Plea, which is concluded to the Juriſdiction; for that ſeems to make only one Doubt; whether the Court of Exchequer could hold Plea of an Action for proceeding contrary to a Prohibition already granted; but this was waved, and then it was argued,

That a Prohibition may lie to this Court. The Objects of its Juriſdiction.

1. That a Prohibition doth lie to this Court of *Chivalry*, in caſe it exceeds the Juriſdiction proper to it; and it was agreed, that the Office of Conſtable is Ancient, and by *Camden* is held to have been in Ure in this Kingdom, in the *Saxons* Time, though the Office of Marſhal is but of a *puiſne date:* But however Great and Noble the Office is, however Large and Extenſive the Juriſdiction is, yet 'tis but limited, and *Coke* in 4 *Inſt.* 123. ſays that 'tis declared ſo, by the Statute of *R.* 2. where 'tis ſaid, that they incroached in great Prejudice of the King's Courts, and to the great Grievance and Oppreſſion of his People, and that their proper Buſineſs is to have Conuſance of Contracts and Deeds of Arms, and of War out of the Realm, which cannot be determined or diſcuſſed by the Common Law, which other Conſtables have heretofore duly and reaſonably uſed in their Time; now by this Act 'tis plain, what the Juriſdiction is: Contracts and Deeds of Arms, and War out of the Realm, are the ſubject Matter of it; and by *Coke* 'tis called *curia militaris*, or the Fountain of Marſhal Law; which ſhews it a Court, that hath its Boundaries, a Court that may incroach, nay, which hath incroach'd in divers Inſtances belonging to the Common Law: And that 'tis a Court that ought to meddle with Nothing that may be determined in *Weſtminſter-hall:* Then there muſt be ſome way of reſtraining this Exceſs and theſe Incroachments; and if the Statute of *R.* 2. had not been made, it muſt be agreed that a Prohibition would have lain; for elſe there had been no Remedy, which is abſurd to affirm.

'Tis no Objection that Prohibitions are only grantable to inferiour Courts, and that this is one of the greateſt Courts in the Realm, for if a Court Marſhal intermeddle with a Common Law Matter, *ea ratione* it becomes inferior, and may be controuled: There needs no Conteſt about the Superiority of Courts in this Matter, 'tis the ſame here, as among private Perſons, he that offends becomes inferior, and ſubject to the Cenſure of his equal by offending; though that Court ſhould be reckoned ſo Noble and Great as hath been repreſented, yet 'tis only ſo, while it keeps within its Juriſdiction; Prohibitions are grantable to almoſt all ſorts of Courts, which differ from the Common Law in their proceeding, to Courts Chriſtian, to the Admiralty, nay, to the Delegates, and even to the Steward and Marſhal, upon the Statute of *Articuli ſuper Chartas*, *cap.* 3. That they ſhall not hold Plea of Freehold or of Treſpaſs, *Fitz. N. B.* 241, 242, is an expreſs Writ of Prohibition, though the Statute gave no ſuch Writ, but only did reſtrain the Juriſdiction of the Court; which in Truth, is the Caſe in Queſtion, antecedent to the Statute pleaded. Argument drawn from its Greatneſs anſwered.

No Argument can be raiſed from the ſubject Matter of the Juriſdiction of this Court, that 'tis different from the Common Law, for ſo is the Admiralty and the Prerogative Courts, nor is it any Objection that upon any Grievance in this Court, the Appeal muſt be to the King, for that holds in the other Courts with equal Reaſon: Nay, Prohibitions lie from *Weſtminſter-hall*, to hinder proceeding in Cauſes, which the Courts that grant ſuch Prohibitions, cannot hold Plea of; as to the Eccleſiaſtical Court which grants Probate of a Will made within a Manor, to the Lord whereof ſuch Probate belongs, 5 *Rep.* 73. to the Marches of *Wales* if they hold Plea of what belongs to Court Chriſtian, 2 *Roll's Abridg.* 313. are ſeveral Caſes to this Purpoſe: There were alſo cited 1 *Roll's Rep.* 42. 2 *Roll's Abridg.* 317. *Sid.* 189. 1 *Brownl.* 143, 144. and *Herne* 543. 'twas further urged, that there neither was nor could be any Reaſon aſſigned, why a Prohibition ſhould not be grantable to the Court of Chancery, when by *Engliſh* Bill it meddles with the Common Law, in other Manner than its Ancient and proper Juriſdiction doth allow, and ſeveral Authorities were cited to countenance that Aſſertion. Other Objections anſwered.

Then was conſidered the Reaſon of Prohibitions in General, that they were to preſerve the Right of the King's Crown and Courts, and the Eaſe and Quiet of the Subject, that 'twas the Wiſdom and Policy of the Law, to ſuppoſe both beſt preſerved, when every Thing runs in its right Channel, according to the Original Juriſdiction of every Court, that by the ſame Reaſon one Court might be allowed to incroach, another might, which could produce nothing but Confuſion and Diſorder in the Adminiſtration of Juſtice. That in all other Writs of Prohibition, the Suggeſtion is, and with Truth, *in præjudicium coronæ Regis & Gravamen partis*, and both theſe are declared to be the Conſequent of this Court's Exceſs or Incroachment of Juriſdiction, even by their own Statutes: And, when the Reaſon is the ſame, the Remedy ought to be ſo. The Reaſon of Prohibitions in General.

But

Objection (as to a Privy Seal) answered.

But it hath been pretended, That the Statute appoints a Privy Seal to superſede, *&c.* and therefore no Prohibition: To this it was anſwered, That this Act doth not take away the Force of the 8 *R.* 2. mentioned in 4 *Inſt.* 125. which reſtrains the Conſtable and Marſhal from meddling with any Plea, which concerns the Common Law: And if it had a limited Juriſdiction by the Common Law, or by that Statute, the ſubſequent Statute which gave a further Remedy to reſtrain them did not take away that which they had before. And every Body muſt agree, that where an Act of Parliament Reſtrains a Juriſdiction, ſuch Act warrants a Prohibition, in caſe that Reſtraint be broken or exceeded. 'Tis ſo in caſe of a limited Power at the Common Law, but much more ſo upon a Statute.

Beſides, the latter Statute which gives a Privy Seal, doth not Repeal or alter the Law then in Being. 'Tis an Affirmative Law, and that ſeldom or never works any Change or Alteration in what was before, any otherwiſe than by Addition or Confirmation. And in Truth this is only a further Remedy; and is far from declaring a Prohibition not to lie. The Meaning might be to give a Privy Seal immediately, even in Vacation Time. The Preamble complains ſo much of the Grievances, that it cannot be ſuppoſed to deſign any Thing in Favour of them, or to prevent the Reſtraint.

Suppoſe between the 8 and the 15 *R.* 2. an Exceſs of Juriſdiction had been uſurped, as in this Caſe, will any Man ſay, that a Prohibition would not then have lain? And if it would, can any Man ſay, that the Statute pleaded doth take it away, or Prohibit ſuch Writ of Prohibition? And the 11 *H.* 4. 24. ordains that all the Statutes concerning the Court of Conſtable and Marſhal, ſhall be duly obſerved; and if ſo, the 8 *R.* 2. as well as the 15 *R.* 2. are within that Ordinance; and if ſo, a Prohibition lies as well as a Privy Seal; and both are little enough to keep that Court within its due Bounds and Limits.

The Matter of the preſent Articles a proper Subject of the Common Law.

2. It was argued, That the Proceeding upon theſe Articles, was an Intermedling with a ſubject Matter properly determinable at Common Law; here's no Contract or Deed of Arms, no Miſ-behaviour in War, nothing of that Nature, which their own Statute ſays belongs to them. *Ruſh.* Vol. 2. Part 2. 1054. he frequented the Court for four Years together, he obſerved no Caſes there but for Words: And one or two, as *Delaware*'s Caſe, about abuſing an Honourable Family, by aſſuming to be a Branch thereof. Here's no ſuch Thing: But expreſs Articles for exerciſing of a Lawful Trade. 'Tis not *cauſa armorum*; it doth neither concern Warlike Matters, nor Honour. A Funeral Ceremony can never be within their Power. This is a plain Accuſation for a wrong to one of their Officers. The Articles charge, that Sir *Henry S. George*, by his Office, within his Province, hath the ordering of theſe Matters, and the Party hath meddled therein without his Licenſe. He ſays, 'tis lawful, and the Exerciſe of a lawful Employment. They ſay, 'tis otherwiſe, becauſe it belongs to another Man's Office. Then 'twas

admitted by the Counſel for the preſent to be ſo, that Sir *Henry* was an Officer by Letters Patent under the Great Seal of *England*, (which by the Way makes the Office and Rights of it to be of Common Law Conuſance,) and the Patent is ſet forth at large in *Prinne*, on 4 *Inſt.* 64, 65. and that the King at Arms hath ſuch a Right; yet if any Man intermeddles or incroaches upon that Office, it is not a Breach of the Rules of Honour, and not relating to Arms; but a plain Injury at Common Law: And an Action lies for it, as it doth for the Diſturbance of any other Office or Franchiſe.

In 4 *Inſt.* 126. 'tis ſaid, that they do upon Requeſt marſhal Funerals: But ſuppoſing they alone ought to do it, then an Action lies. This is meerly a Queſtion, whether the Letters Patent do carry ſuch a ſole Privilege? Suppoſe *Nul tiel record* be pleaded to them, when pleaded or inrolled, and without producing them; ſuppoſe *Non conceſſit* pleaded to them when produced, how ſhall theſe Iſſues be tried? Suppoſe they awarded a Satisfaction to be made to Sir *H. S.* by the Gift of a Sum of Money; and he ſhould afterwards bring an Action at Law for the ſame Cauſe, will the Proceeding in the Court of the Earl Marſhal be a Bar? The Fact alledged in theſe Articles comes within none of thoſe Particulars ſuppoſed to be belonging to this Court, in 1 *Inſt.* 391.

It matters not, whether theſe were publick Funerals, as was queſtioned in *Parker*'s Caſe, *Sid.* 352. and in 2 *Keble* 316, 322. but the Query here is, if this be a Point of Honour; or whether it be not about the Right of an Office? and if it be the latter, they have no Power to determine it.

The Heralds are Officers attendant upon that Court; but it doth not follow, that that Court can judge of the Nature, or Extent, Validity, or Operation of their Letters Patent; no more than the Court Chriſtian can try the Right or Freehold of a Chancellor's or Regiſter's Office. The Earl Marſhal cannot licenſe the doing this in Prejudice of the Heralds, or acquit the Party if he does it, for he ſtill ſtands liable at Law: The Herald hath a Freehold in it, and may bring his Action notwithſtanding.

That the true Court is before both Conſtable and Marſhal.

Then, 3. 'Twas argued, that admitting that no Prohibition did lie to the Court of Honour, or that there was no Cauſe for ſuch Prohibition, yet it ought to be granted to this pretended Court, which is not within their Statute. The true Court is before Conſtable and Marſhal, it is a Court by Preſcription, and cannot be altered but by Act of Parliament: All our Books which deſcribe the Court mention it to be before both, 4 *Inſt.* 125. *Crompt. Juriſdiction* 82. 1 *Inſt.* 74. *Stamford* 65. The Conſtable is the Chief, and ſo are the Old Books, and 37 *Hen.* 6. 20. expreſly before the Conſtable and Marſhal. The Statutes, which mention the Court, do all take Notice of it, as held before both: the 8 *Rich.* 2. and that which they plead, do deſcribe it ſo: And

the 1 *Hen.* 4. *cap.* 14. the 13 *Hen.* 4. 4. 5. all Attainders are pleaded to be before both.

Authority of *Camden* as to the Marſhal.

Camden (who was an Herald) in his Commentary *de Etymologia, antiquitate & officio Comitis Mareſchalli Angliæ*, fol. 87. 'tis publiſhed at the End of his *Latin* Epiſtles, which are in *4to*, printed for *Chiſwell*, 1691. endeavours to advance the Office of Earl Marſhal; and ſearches for the Etymology; and after all, makes him but an Harbinger; and tells us when the Title *Mareſchallus Angliæ* was firſt uſed, and how it hath been enjoyed, and by whom, and of what Families: And afterwards 91. leſſens his Character much; and derives the Office of Marſhal of *England* from that of Marſhal of the Houſhould; which he deſcribes to Diſadvantage. The ſame is likewiſe in *Fleta, lib.* 2. *cap.* 5.

But this is obſervable which *Camden* ſays, that the greateſt Increaſe of the Authority of this Office hath been ſince there were no Conſtables, for the Kings ſince that Time have referred many Things to them, which in former Times were proper for the Conſtable: Neither had the Marſhal any Precedency in reſpect of his Place, until King *Hen.* 8. *Anno* 31. by Parliament aſſigned him Place next to the Lord Conſtable and before the Lord Admiral. All which ſhews that the Earl Marſhal never had that Authority Time out of Mind, to hold this Court before himſelf alone, as is pretended, during the Vacancy of the Office of Conſtable.

In *November* 1640. 'twas voted by the Houſe of Commons, upon a Report from a Committee of ſome of the greateſt Members of the Houſe, *Selden*, *Hollis*, *Maynard*, *Palmer*, *Hide*, &c. that the Earl Marſhal can make no Court without the Conſtable, and that the Earl Marſhal's Court is a Grievance. *Ruſhworth* 2 Vol. 1056. *Nalſon's* 1 Vol. 778.

Spelman ad idem.

Spelman in his Gloſſary, *verbo Mareſchallus*, ſeems to ſay, 'twas *officium primo Servile*, and that he was a meer Servant to the Conſtable, and gives much ſuch another Account of it, as *Camden* doth. And Pag. 403. is an Abſtract or rather Tranſcript of all that is in the Red Book in the Exchequer about the Nature of this Office; and there 'tis ſaid, that if the King be in War, then the Conſtable and Marſhal ſhall hold Pleas, and the Marſhal ſhall have the Amerciaments and Forfeitures of all thoſe, who do break the Commandments of the Conſtable and Marſhal. And then it was further alledged by the Counſel for the Defendant in the Writ of Error, that they knew of no Statute, Record, or ancient Book of Law or Hiſtory, that ever mentioned the Earl Marſhal alone, as having Power to hold a Court by himſelf: So that taking it as a Court held before an incompetent Judge, a Prohibition ought to go, and the Party ought not to be put to his Action, after he has undergone Impriſonment and paid his Fine, ſince it hath the Semblance of a Court, and pretends to act as ſuch. And if it be a Court before the Earl Marſhal alone, in caſe it exceeds the Juriſdiction proper to it, a Prohibition lies either by Force of the Common Law, which ſtates the Boundaries and Limits of that Juriſdiction: Or by Force of the Statute of 8

Rich. 2. which is not repealed by the ſubſequent Law in that Reign. And if ſuch Prohibition do lie in any Caſe, that here was Cauſe for it; the Subject Matter of the Articles being only a Wrong (if any) to a private Officer, who had his proper Remedy at the Common Law: And therefore it was prayed that the Judgment ſhould be affirmed; and it was affirmed.

Judgment affirmed.

Smith & Ux' verſus *Dean and Chapter of Paul's London*, and *Lewis Rugle*.

APPEAL from a Decree of Diſmiſſion made by the Lord *Jeffreys*; the Bill was to compel the Dean and Chapter, as Lord of the Manor, to receive a Petition in Nature of a Writ of falſe Judgment, for Reverſing a Common Recovery ſuffered in the Manor-Court, in 1652. whereby a Remainder in Tail, under which the Plaintiff claimed, was barred, ſuggeſting ſeveral Errors in the Proceeding therein: And that the ſaid Lord might e commanded to examine the ſame, and do Right thereupon.

Reverſal of Recoveries in Copyhold Manors. Whether Equity will compel the Lord to hold Plea for that Purpoſe.

To this Bill the Defendant *Rugle* demurred, and the Dean and Chapter by Anſwer inſiſted, That 'twas the firſt Attempt of this Kind, and of dangerous Conſequence, and therefore conceived it not fit to proceed on the ſaid Petition, unleſs compelled thereto by Courſe of Law. That *Rugle* being the Perſon concerned in Intereſt to conteſt the Sufficiency of the Common Recovery, they hoped the Court would hear his Defence, and determine therein before any Judgment were given againſt them; and that they were only Lords of the Manor, and ready to obey, *&c.* and prayed that their Rights might be preſerved: This Demurrer was heard and ordered to ſtand.

And now it was inſiſted on by the Counſel with the Appellant, that this was the only Remedy which they had; that no Writ of Error or falſe Judgment lies for Reverſing of a Recovery or Judgment obtained in a Copyhold Court; that the only Method was a Bill or Petition to the Lord, in Nature of a Writ of falſe Judgment, which of common Right he ought to receive, and to cauſe Errors and Defects in ſuch Recovery or Judgment to be examined. And for this were cited *Moore* 68. *Owen* 63. *Fitz. N. B.* 12. 1 *Inſt.* 60. 4 *Rep.* 30. is ſuch a Record mentioned to have been ſeen by *Fenner*, where the Lord upon Petition to him had for certain Errors in the Proceedings reverſed ſuch Judgment given in his own Court, 1 *Roll's Abridg.* 600. *Kitchin* 80. 1 *Roll's Abridg.* 539. *Lanc.* 98. *Edward's* Caſe, *Hill.* 8 *Jac.* 1. by all which, it appears, that this is an allowed and the only Remedy.

Argument for the Appellant.

Then

Then it was argued, That in all Caſes where any Party having a Right to any Freehold Eſtate is barred by Judgment, Recovery, or Fine, ſuch Party of common Right may have a Writ of Error, if the ſame be in a Court of Record: And a Writ of falſe Judgment, if in a Court-Baron or County-Court, and reverſe ſuch Judgment, Recovery or Fine for Error or Defect. And there can be no Reaſon aſſigned why a Copyholder (eſpecially conſidering the great Quantity of Land of that Tenure in *England*) ſhould be without Remedy, when a falſe Judgment is given. And the rather, for that in Real Actions (as this was) the Proceedings in the Lord's Courts are according to thoſe in *Weſtminſter-hall*. And now tho' a Common Recovery be a Common Aſſurance, yet it was never pretended that a Writ of Error to reverſe it was refuſed upon that Pretence. And if the Lord of a Manor deny to do his Duty, the *Chancery* hath ſuch a Superior Juriſdiction as to enjoin him thereto. 'Tis the Buſineſs of Equity to ſee that Right be done to all Suitors in Copyhold Courts, *Fitz. Abridg. Subpœna*, 21. 2 *Cro.* 368. 2 *Bulſt.* 336. 1 *Roll's Abr.* 373. If an erroneous Judgment be given in ſuch Court of a common Perſon, in an Action in the Nature of a *Formedon*, a Bill may be in *Chancery* in Nature of a falſe Judgment to reverſe it. And *Lanc.* 38. *Tanfield* ſays that he was of Counſel in the Caſe of *Patteſhall*, and that it was ſo decreed: Which is much more than what is here contended for. And tho' Common Recoveries are favoured, and have been ſupported by ſeveral Acts of Parliament; yet no Parliament ever thought fit to deprive the Parties bound by ſuch Recoveries of the Benefit of a Writ of Error.

Argument for Reſpondent.

On the other Side 'twas urged in Defence of the Diſmiſſion, That the Perſon who ſuffered this Recovery had a Power over the Eſtate. That ſhe might both by Law and Conſcience, upon a Recovery, diſpoſe of it, as ſhe ſhould think fit. That ſhe hath ſuffered a Recovery. And that it was ſuffered according to the Cuſtom of the Manor, tho' not according to the Form of thoſe ſuffered in *Weſtminſter-hall*. That the Suffering of Recoveries in any Court, and the Methods of proceeding in them, are rather notional than real Things: And in the Common Law Courts they are taken Notice of, not as adverſary Suits, but as Common Aſſurances. So that even there, few Miſtakes are deemed ſo great, but what are remedied by the Statute of Jeofails, or will be amended by the Aſſiſtance of the Court. And if it be ſo in the Courts at *Weſtminſter*, where the Proceedings are more ſolemn, and the Judges are Perſons of Learning and Sagacity, how much rather ought this to ſtand, which was ſuffered in 1652. during the Times of Diſorder, and moſt Proceedings informal and in the *Engliſh* Tongue, in ſuch a mean Court where are few Precedents to guide them; where the Parties themſelves are not impowered to draw up their own Proceedings as here above; but the whole is left to the Steward, who is a Stranger to the Perſon concerned: And there-

fore 'tis hard and unreaſonable, that Mens Purchaſes ſhould be prejudiced by the Ignorance, Unskilfulneſs, or Diſhoneſty of a Steward or his Clerks. That there is ſcarce one Cuſtomary Recovery in *England*, which is exactly agreeable to the Rules of the Common Law. That the Queſtioning of this may in Conſequence endanger Multitudes of Titles which have been honeſtly Purchaſed: Eſpecially ſince there can be no Aid from the Statutes of *Jeofailes*; for they do not extend to Courts Baron. 'Twas further urged, That there was no Precedent to enforce Lords of Manors to do as this Bill deſired. That the Lords of Manors are the ultimate Judges of the Regularity or Errors in ſuch Proceedings. That there's no Equity in the Prayer of this Plaintiff. That if the Lord had received ſuch Petition, and were about to proceed to the Reverſal of ſuch Recovery, Equity ought then to interpoſe and quiet the Poſſeſſion under thoſe Recoveries. That *Chancery* ought rather to ſupply a Defect in a common Conveyance (if any ſhall happen) and decree the Execution of what each Party meant and intended by it, much rather, than to aſſiſt the Annulling of a ſolemn Agreement, executed according to Uſage, tho' not ſtrictly conformable to the Rules of Law. For which Reaſons it was prayed that that Appeal might be diſmiſſed, and the Diſmiſſion below confirmed, and 'twas accordingly adjudged ſo.

Decree of Diſmiſſion confirmed.

The Counteſs of Radnor verſus *Vandebendy & al'.*

APPEAL from a Decree of Diſmiſſion in *Chancery*; the Caſe was to this Effect: The Earl of *Warwick*, upon Marriage of his Son, ſettles Part of his Eſtate upon his Lady for a Jointure, and after Failure of Iſſue Male limits a Term for 99 Years to Truſtees, to be diſpoſed of by the Earl either by Deed or Will: And for want of ſuch Appointment, then in Truſt for the next in Remainder, and then limited the whole Eſtate in ſuch Manner, as that a third Part of a Moiety thereof came to the Lord *Bodmyn* (the Appellant's late Husband) in Tail general, with the Reverſion in Fee to the Earl and his Heirs. The Son died without Iſſue, the Earl by his Will appoints the Lands to his Counteſs for ſo many Years of the Term as ſhe ſhould live, and to her Executors for one Year after her Death, and charges the Term with ſeveral Annuities, ſome of which remain in Being. The Reſpondent's Father purchaſed Part of theſe Lands from the Lord *Bodmyn* after his Marriage, and had the Term aſſigned to him. The Lord *Bodmyn* dies, the Appellant brings her Writ of Dower in *C. B.* the Reſpondent pleads the Term for 99 Years; and ſhe exhibits

S. C. 1 Ver. 179, 356. 2 Ch. C. 172.

Dower whether to be defeated by a Term attending the Inheritance in Equity.

her Bill, praying that she may, after the Discharge of the Earl's Incumbrances, have the Benefit of the Trust as to a Third of the Profits of this Term; and upon hearing the Cause, the Lord Chancellor saw no Cause to give Relief, but dismissed her Bill. There were many Particulars in the Case, and many Proceedings before, both in Law and Equity; but this was the whole Case as to the general Question, Whether a Tenant in Dower shall have the Benefit of the Trust of a Term which is ordered to attend the Inheritance, against a Purchaser after the Marriage? The Lord Chancellor *Jeffryes* had been of Opinion with the Appellant, but the Cause coming to be heard again, a Dismission was decreed; and

Argument for the Appellant.

now it was argued against the Decree on Behalf of the Appellant, that Equity did intitle her to the Thirds of this Term; that a Tenant by the Curtesy is intitled to it, and by the same Reason a Tenant in Dower. That the Term created by the Settlement was to attend all the Estates limited by that Settlement, and in Trust for such Persons as should claim under it: Which the Appellant doth as well as the Respondents. That it was in Consequence to attend all the Particular Estates carved or derived from the others. The Term was never in its Creation designed for this Purpose, to prevent or protect against Dower. That in the Case of *Snell* and *Clay*, the Tenant in Dower had it in Chancery against the Heir

a Ver. 324.

at Law. And that this was the same Case: A Purchaser with Notice of that Incumbrance of Dower, the Vendor being then married; this was an Estate of which the Husband was full Owner, and received the whole Profits: That in Proportion, 'tis as much a Trust for her, for her Thirds during Life, as it is a Trust for the Respondents for the Inheritance: She claims under her Husband who had the Benefit of the whole Trust. If there be a Mortgage by an Ancestor upon the whole, Equity will permit her to redeem, paying her Proportion according to the Value of her Thirds for Life: And the same Reason holds in this Case: And there's no Precedent in Equity to the Contrary. And many Precedents in Favour of Tenant in Dower were cited, and much Reason well urged from parallel Cases, to intitle the Lady to her Proportion of the Trust of this Term.

Argument for the Respondent.

On the other Side 'twas said, that Dower is an Interest or Right at the Common Law only: That no Title can be maintained to have Dower, but where the Common Law gives it: And that is only to have the Thirds of that which the Husband was seized of: And if a Term were in Being, no Feme was ever let in but after the Determination of that Term: That this is the first Pretence set up for a Dower in Equity. The Right is only to the Thirds of the Rent reserved upon any Term: And 'tis a new Thing to affirm, that there shall be one sort of Dower at Law, and another in *Chancery*. That 'tis, and always hath been, the common received Opinion of *Westminster-hall*, and of all Conveyancers, that a Term or Statute prevents Dower. That if a Purchaser can procure it, the same becomes his Defence: That this is what the Wisdom of our

Forefathers thought fit to uſe. And tho' ſome Mens reaſoning may render it in Appearance as abſurd: Yet the Conſequence of an Alteration will be much more dangerous than the Continuance of the old Rules. That tho' this Lady's Caſe be unfortunate, yet the Multitude of Purchaſers, who have bought upon full Conſideration, and have been adviſed, and ſtill conceive themſelves ſafe under this Law, will be more unfortunate, if the Law be broken. Then 'twas argued, That there could be no Equity in this Caſe, for it muſt be not only from the Party Appellant, but alſo againſt the Reſpondent, and that 'tis not, becauſe he bought the whole: Her Portion, her Quality, and her being a Wife, create no Equity as to the Purchaſer. 'Twould perhaps be prevalent againſt an Heir, but not againſt him. Here is no Fraud or ill Practiſe, *&c.* Then if the Nature of the Thing be conſidered, the Demand is of a Right, not ariſing by Agreement of Parties, but by Operation of Law. If the former, *Chancery* might perhaps conſtrue and enlarge it, ſo as to fulfil the utmoſt Intention: But here, her Title is the Marriage, the Seiſin, and Death of the Husband. And there never was a Time, when, if her Lord had died, ſhe could have had immediate Dower; for even the Term had been pleadable by an Heir of Law to a Writ of Dower. Now what doth give her an Equity againſt the Reſpondent? Her Claim is by, from and under her Husband, as having a Right to a Proportion of what he had: That is a Right by Law. Where is the Equity that ſhould improve or mend this Right? Perhaps it muſt be agreed, That if the Husband had juſt before Marriage made a long Leaſe on Purpoſe to prevent Dower, and the Woman expecting the Privileges which the Common Law gives to Women married had ſurvived him, Equity might have interpoſed. And yet even this was practiſed by a Reverend Judge of Equity, Mr. Serjeant *Maynard*, who made ſuch Leaſe to his Man *Bradford* the Day before his laſt Marriage. But here is no ſuch Action, 'twas an old Term created by the old Earl of *Warwick*.

As to the Caſe of the Mortgages: The Feme intitled to Dower is let in, becauſe the Perſon who is the Mortgagee hath no Intereſt but to have his Money; and Equity is to execute all theſe Agreements: But never where there is a Purchaſer, or where the Intereſt of the Mortgage is aſſigned to the Heir. Between her ſelf and the Mortgagee, ſhe comes in Place of her Husband; and the Husband could redeem: And ſo may the Wife. But againſt a Purchaſer ſhe has no more Equity than her Husband had: And that is none at all. If ſhe hath a legal Title antecedent to the Purchaſers; as Marriage and Seiſin, where there's no Term ſtanding out, that ſhall prevail, and Equity ſhall not help the Purchaſer againſt her: So where the Purchaſer hath a legal Title; as by a Term precedent, Equity cannot relieve her. And whereas it was objected, That there was no Caſe adjudged in *Chancery* againſt the Appellant's Pretence; the Anſwer is plain, The Common Law is againſt it; and if no Precedent in Equity, the Common Law ought to ſtand. 'Tis nothing but Precedent that conſecrates Half the

the Decrees in Equity: And no Man will ſay, that ever any Woman was endowed in Equity of a Truſt Eſtate. If a Man hath a Term for Ten thouſand Years, and be intirely and properly Owner of it; tho' the ſame be equal in Value to a Fee-ſimple, for the Reverſion after it is worth little or nothing; yet no Dower can be claimed in Equity. Nay, If the Husband be ſeized together with another Perſon, and not ſole ſeized, yet no Dower, even in *Chancery* can be claimed againſt the Survivor. So that Equity doth not exceed the Rules of Law in advancing the Right of Dower. 'Tis true, unleſs Fraud be in the Caſe, (according to the Caſe of *Naſh* and *Preſton* in *Cro. Car.* 190, 191.) Relief in Equity ſhall not be given againſt a legal Title to Dower: Yet 'tis as True, that where the Law doth not give Dower, Equity will not, unleſs there be Fraud and Covin uſed to prevent it; and then common Reaſon enjoins a Court of Conſcience to Relieve. If any Allowance had been in the Purchaſe, upon Conſideration of the Title to Dower, the ſame would have been a very material Argument; but in this Caſe there was none: And therefore 'twas prayed that the Diſmiſſion might be affirmed, and it was ſo.

Decree of Diſmiſſion affirm'd.

Dominus Rex verſus *Baden.*

Whether Outlawry on meſne Proceſs is to be preferr'd to a Judgment not extended.

WRIT of Error to reverſe a Judgment given in the Court of *Exchequer*, and affirmed upon a Writ of Error in the Council Chamber before the Chancellor, with the Aſſiſtance of the two Chief Juſtices. The Caſe upon the Record was only this; One *Allen* outlaws one *Clerk* in Debt on a Bond in *Mich.* 1690. on the ſeventh of *Jan.* 1690. by Virtue of a ſpecial *Capias utlagatum*, and Inquiſition thereupon, ſeizes *Clerk*'s Lands into their Majeſties Hand. In *Hillary* Term following the Outlawry and Inquiſition are certified into the *Exchequer*, and *Allen* obtains a Leaſe under a Rent. In *Mich.* 1692. *Baden* comes and pleads that in *Mich.* 4 *Jac.* 2. he recovered a Judgment againſt *Clerk* for 1080 *l.* that in *Trinity* Term 1691 he took out an *Elegit*, and had a Moiety of the Lands extended, and therefore prays that an *Amoveas manus* may be awarded. Mr. Attorney replies, That the Lands were ſeized by Virtue of the Outlawry and Inquiſition long before the *Elegit* was ſued, and therefore, *&c.* *Baden* demurs, and Judgment for the King.

Argument for Plaintiff in Error. Difference between

It was argued on Behalf of the Plaintiff in the Writ of Error, that this Judgment was Erroneous, for that there's a vaſt Difference between an Outlawry in a Civil and one in a Criminal Proceſs: That in a Civil Action, 'tis only a Civil Proceſs for the Benefit of the Party; and 5 *Edw.* 3. *cap.* 12. the King cannot pardon an Outlawry at the Suit of a private Perſon. That 'tis only to help one Subject to his Debt from another. That the King hath

no Advantage by it, and ſo no Need of a Preference by Reaſon of the Prerogative. That at Common Law no Man could be outlawed. That now it is purely given for the Sake of the Plaintiff; that the common Practiſe is to make a Leaſe, or grant a Privy Seal to the Party. That by this Outlawry the King hath no Intereſt in the Land; he cannot cut down the Trees, 9 *H.* 6. 20. that he cannot Plow or Sow; but only collect and receive the Profits which ariſe out of the Land. *Bro.* tit. *Outlawry* 36. tit. *Patents* 3. that the King hath not the Poſſeſſion of the Land, which ſhews it not to be a Forfeiture to the King, but it remains the Party's, ſtill, in reſpect of Ownerſhip, he may make a Feoffment, 21 *Hen.* 7. 7. 2 *Inſt.* 675. *Hob.* 122. by the Judgment the Lands were bound, tho' the Title was not compleat, till the *Elegit* was ſued out; a *Monſtrans de droit* or Petition did lie, and now the ſame Matter may be pleaded. 'Twas further argued, That great Miſchief muſt follow, if an Outlawry upon Civil Proceſs may defeat a Judgment. That Judgments with Releaſe of Errors are taken and uſed as common Securities. That this is moſt plainly a Device to avoid them. That this can be no Security, if an *Elegit* may not be ſued, but prevented by the Party himſelf: For here it is his own Default, not to avoid this Outlawry by Appearance. That no Act of the Debtor could alter the Security, and there's no Reaſon why his Neglect ſhould. That this Conteſt is between *Baden* and *Allen*, and not between *Baden* and the King. *Allen's* Suit was but juſt begun, and this is merely upon his Suit. If the Perſon had been taken upon this *Capias*, he had been the Plaintiff's Priſoner; and if he Eſcapes the Plaintiff had an Action for it, *Yelv.* 19. and the ſuppoſed Forfeiture is only for his Intereſt. 3 *Cro.* 909. And by this Practiſe the King's Prerogative is to aſſiſt one Subject to deceive another. By the Law a Judgment is preferable to a Bond, and binds the Land, which a Bond doth not till Judgment upon it. Now here the firſt is to be poſtponed, by Reaſon of the King's ſuppoſed Prerogative, which is only a Right in the King, for the Uſe of the Party to have the Profits. 2 *Roll's Abridg.* 808. *Vide Stamford* 57. 1 *Inſt.* 30. & *Hardres* 101, 176. 1 *Inſt.* 202. *Latch* 43. That the *Elegit* hath Relation to the Judgment, and ſo becomes Prior to the King's Title; like the Relation of a Bargain and Sale to an Inrollment. And as a ſtrong Argument for it, the Words in the Writ of *Elegit* were repeated and enforced, *quo die Jud' reddit' fuit*, which ſhewed a Relation to that Day; and conſequently did affect the Lands at a Time when the King had no Intereſt in it.

Outlawry in Civil and Criminal Actions.

On the other Side it was argued with the Judgment, That this was the common Practiſe of the Court of *Exchequer* in this Caſe; that the Courſe of a Court is the Law of that Court, and to be taken Notice of by all other Courts; that 'tis Time out of Mind, and conſequently of equal Duration with the Common Law, and always deemed to be Parcel thereof. That the Records and Experience of the ancient Clerks were both concurring to prove it the common Uſage in the *Exchequer*. That when Lands are ſeized into the King's Hands by Virtue of an Outlawry and Inquiſition, it was

Argument for Defendant in Error.

From the Courſe of the Court of Exchequer.

never known, that the King's Hands were removed by Force of an *Elegit* ſued afterwards, tho' upon a Judgment precedent. That it hath been their conſtant Practiſe to continue the Pernancy of the Profits in the King, notwithſtanding ſuch *Elegit*. That 'twould be of dangerous Conſequence to alter the ſame by a new Opinion. That 'tis not ſo very material, whether this Practiſe be more reaſonable than another, but whether it be certain and known. For if it be ſo, 'tis much better to have it continued than changed, becauſe of the Confuſion which muſt follow, by ſhaking the Rights and Poſſeſſions enjoyed under the former Practiſe. That 'tis not in many Caſes ſo conſiderable what the Rule is, as that it be fixed and underſtood; and therefore no Reaſon to alter it, or at leaſt not without the Aid of the Legiſlature; for by the ſame Colour that ſome Judges of Parts and Sagacity ſhall think fit to ſwerve from their Predeceſſors, others of leſs Capacity may pretend to do the ſame, and ſo nothing but Uncertainty would enſue.

Judgment. *Elegit.*

But beſides, this is not merely a Courſe of the Court, 'tis alſo agreeable to the Rule and Reaſon of the Laws. *Baden* hath no Intereſt in the Land 'till he ſues his *Elegit*; whereas the King's Title to the Land was compleat by the Outlawry and Inquiſition, which was Prior to the *Elegit*; and a Judgment of it ſelf doth not affect the Land, till Election made. A Judgment at Law is only an Award of the Court aſcertaining of the Debt, and declaring that the Plaintiff ſhall recover. In it ſelf it doth no more affect the Land than a Bond. 'Tis true, when the Suit is ended by a Judgment, the Party may reſort to an *Elegit* for his Execution, if he thinks fit, and can find any Thing ſubject thereto. At the Common Law, before the Statute of *Weſtminſt.* 2. *cap.* 18. a Subject, upon his Judgment for Debt or Damages, could not have Execution by taking away the Poſſeſſion of his Adverſary's Land, becauſe that would hinder the Man's following of Husbandry and Tillage, which then was reckoned beneficial to the Publick: So is 2 *Inſt.* 394. and Sir *William Herbert*'s Caſe, 3 *Rep.* 11, 12. nothing but a *Levari* or *Fieri facias*. Then by the Statute, *ſit in Electione illius*, and *Coke* in his Comment on thoſe Words, ſaith, After the Suing of an *Elegit*, he can't have a *Capias*: So that by him, the Suing out of the Writ is the Determining of his Election. 2 *Inſt.* 395. *Foſter* and *Jackſon*'s Caſe. *Hob.* 57. Even the *Elegit* it ſelf doth not (when ſued out) immediately touch the Lands; for if the Chattels be ſufficient to pay the Debt, and it ſo appears to the Sheriff, that thereby he may ſatisfy the Plaintiff's Demand, then he ought not to extend the Land; and this appears by the Frame of the Writ, as 'tis in the *Regiſter* 299. 2 *Inſt.* 395. which ſhews that no Title can be acquired to the Land, till the ſame be Extended.

Relation a Fiction.

The *Elegit* cannot by Law have Relation to the Time of the Judgment, ſo as to avoid the King's Title; for Relation is only a Fiction; and Fiction ſhall never bind or prejudice the King in his Right, much leſs in his Prerogative; and no Caſe can be ſhewn, where a Relation ſhall conclude the King:

nor is it any Objection, That this is a Prerogative for the Benefit of a Subject; for in Truth all the Prerogatives are for the Advantage and Good of the People, or elſe they ought not to be allowed by the Law. Beſides Practiſe and Reaſon, there's expreſs Authority in our Books for it; as the Caſe of *Maſters* verſus Sir *Herbert Whitfield* 1657. *Hardres* 106. And if there were no Book for it, the Practiſe is enough; for the Printing of a Caſe doth not alter or change the Nature of it: 'Tis as much Authority if it be not publiſhed, as when it is ſo. *Maſters* recovered a Judgment againſt Sir *Herbert Whitfield*, and after the Judgment Sir *Herbert* was outlawed at another Man's Suit, and his Land's ſeized into the Protector's Hands, and afterwards *Maſters* took out an *Elegit*; and the whole Court was of Opinion, that the Lands being ſeized into the Protector's Hands before the *Elegit* was ſued out, there could not be an *Amoveas manus* awarded, altho' the Judgment was prior to the Outlawry. This is the ſame with the Caſe at Bar. And tho' it may be ſurmiſed, That this was an Opinion vented in Evil Times, yet 'tis well known, that excepting their Criminal Proceedings in thoſe Times, the Law flouriſhed, and the Judges were Men of Learning, as Mr. Juſtice *Twiſden* hath often affirmed upon the Bench. 'Twas further urged, That Prerogative was to be favoured; that 'twas a Part of the Law, 2 *Inſt.* 296. eſpecially when 'twas uſed, as in this Caſe, to help an honeſt Man to his Debt. That confeſſing of Judgments was oftner practiſed by Fraud to cover Mens Eſtates, than Outlawries were to defeat juſt Judgments. That if this Judgment was juſt and honeſt, 'twas his own Default not to ſue an *Elegit* immediately. Then were cited many Caſes to prove the King's Prerogative, as *Fleetwood*'s Caſe, 8 *Rep.* 171. *York* and *Athen*'s Caſe, *Lane*'s *Rep.* 20. *Hob.* 115. 2 *Roll*'s *Abridg.* 158. *Stevenſon*'s Caſe, 1 *Cro.* 389, 390. 'Twas argued that nothing could be inferred from *Tanfield*'s Opinion in 2 *Roll*'s *Abridg.* 159. which is alſo in *Lane*'s *Rep.* 65. for there the Debt was not a Debt to the King, till after the Death of the Teſtator; but here is a Forfeiture to the King before the *Elegit* ſued. And admitting that the King hath only the Pernancy of the Profits, yet while he hath ſo, no other Perſon can intermeddle; for the King is intitled to all the Profits, even to a Preſentment to a Church, which was void before the Outlawry. As is *Beverly*'s Caſe, 1 *Leon.* 63. 2 *Roll*'s *Abridg.* 807, and *Oland*'s Caſe, 5 *Rep.* 116. And Proceſs of Outlawry is to be favoured and encouraged, as 'tis a Means for the Recovery of juſt Debts; and the Effects of them, by Forfeiture to the King, ought to be favoured as a Prerogative, wherewith the King is intruſted to that Purpoſe. 'Tis a Penalty or Judgment upon him to be put *Extra Legem*, becauſe he contemns the Law, and will not obey it; ſo that as to him, 'tis the greateſt Juſtice in the World, that he ſhould not enjoy any Benefit of his Eſtate by Virtue of the Law, during the Time that he deſpiſes it. And as to *Baden*, 'twas his own Default that he did not extend ſooner. He truſted the Party longer than he ſhould, and for that he may thank himſelf. Wherefore upon the whole 'twas prayed that the Judgment ſhould be affirmed; and it was affirmed. Judgment affirmed.

Hall

Hall & al' Executors of Tho. Thynne verſus *Jane Potter Adminiſtratrix of George Potter.*

Marriage-Brocage Bond. 3 Lev. 411.

APPEAL from a Decree of Diſmiſſion in the Court of *Chancery*. The Caſe was thus; That *Thomas Thynne*, Eſq; having Intentions to make his Addreſſes to the Lady *Ogle*, gave a Bond of 1000 *l.* Penalty to the Reſpondent's Husband to pay 500 *l.* in ten Days after his Marriage with the Lady *Ogle*; the Reſpondent aſſiſted in promoting the ſaid Marriage, which afterwards took Effect; ſoon after the ſaid *Thynne* was barbarouſly murdered and about ſix Years after Mr. *Potter* brought an Action upon this Bond againſt the Appellants, as Executors of Mr. *Thynne*, and proving the Marriage recovered a Verdict for the 1000 *l.* Thereupon the Appellants preferred their Bill in *Chancery* to be relieved againſt this Bond, as given upon an unlawful Conſideration. The Defendants by their Anſwer acknowledge the Promotion of that Marriage to be the Reaſon of giving the Bond. Upon hearing the Cauſe at the *Rolls*, the Court decreed the Bond to be delivered up, and Satisfaction to be acknowledged upon the Judgment. The Reſpondent petitioned the Lord Keeper for a Re-hearing; and the ſame being re-heard accordingly, his Lordſhip was pleaſed to Reverſe that Decree, and ordered the Reſpondents to pay Principal, Intereſt and Coſts, or elſe the Bill to ſtand diſmiſt with Coſts.

Argument for the Appellants. Bonds with unlawful Condition void at Common Law.

And it was argued on Behalf of the Appellants, That this Bond ought in Equity to be ſet aſide: For that even at the Common Law, Bonds founded upon unlawful Conſiderations appearing in the Condition were void: That in many Inſtances, Bonds and Contracts that are good at Law, and cannot be avoided there, are cancelled in Equity. That ſuch Bonds to Match-makers and Procurers of Marriage are of dangerous Conſequence, and tend to the Betraying, and oftentimes to the Ruin of Perſons of Quality and Fortune. And if the Uſe of ſuch Securities and Contracts be allowed and countenanced, the ſame may prove the Occaſion of many unhappy Marriages, to the Prejudice and Diſcomfort of the beſt of Families. That the Conſideration of ſuch Bonds and Securities have always been diſcountenanced, and Relief in Equity given againſt them, even ſo long ſince as the Lord *Coventry*'s Time, and long before. And particularly in the Caſe of *Arundel* and *Trevillian*; between whom the Fourth of *February*, 11 *Car.* 1. was an Order made in theſe or the like Words: *Upon the Hearing and Debating of the Matter this preſent Day in the Preſence of the Counſel Learned, on both Sides, for and touching the Bond or Bill of* 1001. *againſt which the Plaintiff by his Bill prayeth Relief: It appeared that the ſaid Bill was originally entred into by the Plaintiff unto the Defendant for the Payment of* 1001. *formerly promiſed*

1 Chanc. Rep. 87.

ed unto the ſaid Defendant by the Plaintiff, for the effecting of a Marriage between the Plaintiff and Elizabeth *his now Wife, which the ſaid Defendant procured accordingly, as his Counſel alledged. But this Court utterly diſliking the Conſideration whereupon the ſaid Bill was given, the ſame being of dangerous Conſequence in Precedent, upon reading three ſeveral Precedents, wherein this Court hath relieved others in like Caſes, againſt Bonds of that Nature, thought not fit to give any Countenance unto Specialties entred into upon ſuch Contracts: It is therefore ordered and decreed, That the ſaid Defendant ſhall bring the ſaid Bill into this Court, to be delivered up to the Plaintiff to be cancelled.* Then 'twas further urged, That the Appellants had once a Decree at the *Rolls* to be relieved againſt the Bond in Queſtion, upon Conſideration of the ſaid Precedent in the Time of the ſaid Lord *Coventry* and others, and of the Miſchiefs and Inconveniences likely to ariſe by ſuch Practiſes, which increaſe in the preſent Age more than in the Times when Relief was given againſt ſuch Bonds: And therefore 'twas prayed that the Decree might be Reverſed.

Argument for the Reſpondents.

On the other Side it was urged, That the Conſideration of this Bond was lawful. That the Aſſiſting and Promoting of a Marriage at the Parties Requeſt, was a good Conſideration at Law in all Times to maintain a Promiſe for Payment of Money. That this Bond was Voluntary, and the Party who was Obligor was of Age and ſound Memory. That here was no Fraud or Deceit in procuring it. That *Chancery* was not to relieve againſt voluntary Acts. That here was a great Fortune to be acquired to the Appellant's Teſtator by the Match. That here was Aſſiſtance given. That the Perſons were both of great Quality and Eſtate, and no Impoſition or Deceit on either ſide in the Marriage. That it might be proper to relieve againſt ſuch Securities, where ill Conſequences did enſue; yet here being none, and the thing Lawful, and the Bond good at Law, the ſame ought to ſtand: That here are no Children Purchaſers or Creditors to be defeated; there are Aſſets ſufficient to pay all; and conſequently there can be no Injuſtice in allowing this Bond to remain in force. That it was the Expectation of the Reſpondent, without which ſhe would not have given her Service in this Matter. And that it was the full Meaning of the Appellant's Teſtator to pay this Money, in caſe the Marriage took effect. That there was a vaſt Difference between Supporting and Vacating a Contract in *Chancery*. That tho' Equity perhaps would not aſſiſt and help a Security upon ſuch a Conſideration, if it were defective at Law; yet where it was good at Law, and no Cheat or Impoſition upon the Party, but he meant (as he had undertaken) to pay this Money, and was not deceived in his Expectation as to the Succeſs of the Reſpondent's Endeavours, 'twould be hard in Equity to damn ſuch a Security, and therefore it was prayed that the Decree ſhould be affirmed.

Reply. It was replied, That Marriages ought to be procured and promoted by the Mediation of Friends and Relations, and not of Hirelings. That the not vacating ſuch Bonds, when queſtioned in a Court of Equity, would be of Evil Example to Executors, Truſtees, Guardians, Servants, and other People having the Care of Children. And therefore it was prayed that the Decree might be reverſed; and it was reverſed accordingly.

Decree reverſed.

The Society of the Governor and Aſſiſtants, London, *of the new Plantation of* Ulſter *in the Kingdom of* Ireland, verſus *William Lord Biſhop of* Derry.

Dependency of *Ireland* as to the Juriſdiction of the Houſe of Lords. *N.B.* The general Doctrine of this Caſe is further ſettled by Statute 6 *Geo.* 1.

APPEAL from a Judgment by the Lords Spiritual and Temporal of *Ireland* in Parliament aſſembled, upon the Biſhop's Petition and Appeal to their Lordſhips from an Order in the *Chancery*, touching certain Lands in the County and Liberties of *London Derry*. It ſets forth, amongſt other Things, (after a Recital of the Proceedings in *Chancery* and the Merits of the Cauſe) that the Appellants were adviſed, that no Appeal lies to the Houſe of Lords in *Ireland* from the Court of *Chancery* there: But that all Appeals from thence ought to be immediately to their Lordſhips here, the Supreme Judicature as well for Matters ariſing in *Ireland* as in this Kingdom. And therefore in the Concluſion prays that an Order might be made for the ſaid Biſhop to appear, and put in his Anſwer thereto, that the Matter might be heard before their Lordſhips here, when it ſhould be thought fit; and that the Petitioners might receive ſuch Relief as ſhould be agreeable to their Lordſhips great Wiſdom and Juſtice, *&c.*

Upon preſenting this Appeal to the Lords here, the Houſe appointed Lords Committees to conſider the proper Method of Appealing from the Decrees made in the Court of *Chancery* in *Ireland*, and to report, *&c.* Then purſuant to an Order made by the Lords Committees, and a Letter ſent to the Lords Juſtices of *Ireland*, by Order of the Houſe of Lords here, ſome Precedents or Caſes from *Ireland* relating to the Method of Appealing from the *Chancery* there, were brought before the ſaid Committee, and reported to the Houſe; whereupon the Houſe Ordered that both Parties might have Copies of the ſame.

Then the Society took Copies, and preferred a ſhort Petition to the Houſe, ſetting forth the ſaid Matter, and that they were ready by their Counſel to offer ſeveral Things, in order to their Lordſhip's Receiving and Proceeding upon their ſaid Appeal:

Whereupon a Day was appointed for the hearing of Counſel on both Sides, with Regard to Juriſdiction.

And it was accordingly argued on Behalf of the ſaid Society, that the Judgments in *Ireland*, whether in Law or Equity, were not to be finally Determined there. That *Ireland* was dependant upon *England*. 'Twas urged to prove it, that our Money was to be Current there. That our Laws did oblige them; that they were governed *ſecundum leges & conſuetudines Anglicanas*. *Davis* 21. in which Book 24. that the *Eaſterlings* in *England*, who firſt made the Money of this Standard, (and from whoſe Name comes that of *Sterling*,) were the firſt Founders of the four Principal Cities of *Ireland*, *Dublin*, *Waterford*, *Corke*, and *Limrick*, and the other Maritime Vills in that Country; and were the ſole Maintainers of Traffick and Commerce there, which were all utterly neglected by the *Iriſh*. Argument for Appellants.

Theſe Cities and Vills were under the Protection of King *Edgar* and *Edward* the Confeſſor, before the *Norman* Conqueſt; and theſe *Eaſterlings* in Ancient Record are called *Oſtmanni*: And therefore when *H.* 2. upon the firſt Conqueſt, after their Apoſtacy, thought fit to People thoſe Cities and Vills with *Engliſh* Colonies drawn from *Exeter*, *Briſtol* and *Cheſter*, *&c.* he aſſigned to them a certain Proportion of Land, next adjoining to each of thoſe Cities: Which Portion, is called in the Records in Ancient Time, *Cantreda Oſtmannorum*. *Davis* 25. ſays further that *Ireland* is a Member of *England*, *& Inhabitantes ibidem legibus Angliæ ſubjiciuntur & utuntur*.

In the Statute of Faculties, 28 *Hen.* 8. *cap.* 19. 'tis mentioned to be the King's Land of *Ireland*, and that this the King's Land of *Ireland* is a Member Appendant, and rightfully belonging to the Imperial Crown of the Realm of *England*, and united to the ſame. And in the 33 *H.* 8. *cap.* 1. by which the Stile and Title of King of *Ireland* was given to *H.* 8. his Heirs and Succeſſors, 'tis further Enacted, that the King ſhall enjoy this Stile and Title, and all other Royal Preeminences, Prerogatives and Dignities, as united and annexed to the Imperial Crown of *England*.

Nay, It may be compared to a County Palatine, created by the King of *England*; for *Davis* 62. ſpeaking of that, he ſays, that a County Palatine hath in it *Jura regalia*, which conſiſts in Royal Juriſdiction and Royal Seignory. By the firſt, it hath all its High Courts and Officers of Juſtice which the King hath; and by the latter, it hath Royal Services and Royal Eſcheats, as the King hath: And therefore in ſome Reſpects, 'tis ſeparated and diſjoined from the Crown, as is *Plow.* 215. yet 'tis ſubordinate and dependant. Though it be ſaid, that *breve Dom' Regis non Currit* there, yet the Writ of Error, which is the dernier Reſort, and in like Manner an Appeal, is excepted out of their Charters. So is *Dyer* 321. and 345. 34 *H.* 6. 42. and it would be excepted, if it were not ſo expreſſed. For to have the ultimate Judgment, is that which the King cannot grant; for ſuch Grant would (if allowed) alter the

the fundamental Conſtitution of the Realm. So, in *Ireland*, which is a Realm of it ſelf, as Conſiſting of many Counties, Erroneous Judgments given in the chief Place there ſhall be reverſed in the King's Bench in *England*. *Davis* quotes *Bracton, lib.* 3. *tit' Coron', cap.* 8. that *Comites Palatini habent regalem juriſdictionem in omnibus, Salvo Dominio Regi ſicut principi*; ſo that by his Opinion, they are much the ſame: And no Man will deny, but that in all Proceedings in Law or Equity, the laſt Reſort is to the Parliament of *England*. There it is that the King's ſupreme Authority is exerciſed.

It muſt not be ſaid to be a conquered Country, for the Earl of *Strafford*'s ſake, though *Coke* and *Vaughan* have affirmed it ſo: But it may be called a Plantation or Colony, dependant upon *England*, and to many Purpoſes Parcel of it. This hath not only the ſame Perſon for their King, but 'tis under the Crown and Government of *England*: There muſt be in all theſe Caſes a Superiority or Superintendency over inferior Dominions, for otherwiſe, (as *Vaughan* puts it, 401.) the Law appointed or permitted to ſuch Places might be inſenſibly changed within it ſelf, without the Aſſent of the Dominion Superiour. And, 2. Judgments or Decrees might be there made or given to the Diſadvantage or of leſſening that Superiority: Which cannot be reaſonable; or to make the Superiority to be only in the King, not in the Crown of *England*, (as King *Jac.* 1. would have it, and conſulted *Selden* upon the Point.)

Now, though the Writ of Error be only mentioned, yet the ſame Reaſon holds to both. And the true Cauſe, why we have not ſo many ancient Precedents of Equity Caſes as of Law ones, is, for that in ancient Time the Equity Courts were not ſo high, meddled with few Matters, and in a Summary way: But ſince their Authority is ſo advanced, and their Juriſdiction ſo enlarged, that moſt Queſtions of Property are become determinable there, and almoſt every Suit begins or Ends with them, to the intire Subverſion of the old Common Law; it is and muſt now be reaſonable to have the Examination of their final Sentences in the Parliament of *England* as well as of the other.

Suppoſe Non-reſidence in *Ireland* ſhould be pretended a Forfeiture of the Eſtate to the next Remainder Man or to the King: Can it be ſafe for to intruſt them with a concluſive Opinion in this Matter? When *Calais* was in our Hands, Writs of Error lay thither, 21 *Hen.* 7. *fol.* 3. As to the Pretence, that the Orders of this Houſe cannot be executed there; 'tis very vain: For if the King's Bench Command their Judgments to be executed there, this Houſe may order theirs; and in like Manner as they do to the Chancery here.

In 15 *Rich.* 2. Numb. 17. in the Abbot of St. *Oſithe*'s Caſe, the Lords here made an Order, and charged the Lord Chancellor that he ſee it performed; and this hath been conſtant Practiſe.

It hath been imagined, That the Juriſdiction of this Houſe in Matters of this Kind, is Dated from the 21 *Jac.* 1. as to the Proceedings in *Chancery*: But that is not now to be diſputed; for the Commons in Parliament Aſſembled did agree it to be the Right of this Houſe, in the Caſe of *Skinner* and the *Eaſt-India* Company. And in the Book about it, ſuppoſed to be written by that Noble Lord, the Lord *Hollis*, 105. 'tis ſaid, that where the King's Sovereignty doth not reach, the Juriſdiction of this Houſe cannot; the contrary is implied, that where the King of *England*'s Sovereignty doth extend, the Juriſdiction of this Houſe doth ſo too. And no Man will affirm, That *Ireland* is out of or beyond the Limits of the Sovereignty of the *Engliſh* Crown. And as to the Exerciſe of this Judicature by the Lords here, nothing can be ſtronger for it, than the 1 *H.* 4. Numb. 79. So 'tis in the Record, though in *Cotton*'s *Abridg.* 'tis 80. the Commons declare that all Judgments Appertain to the King and Lords, and not to them; *Skinner*'s Caſe, 199, 200. 4 *Inſt.* 349, 353, 354.

It was farther argued, That Protection commands a due Subjection, and that theſe People who inſiſted upon this Independency, had forgot the *Engliſh* Treaſure and Blood, which had been ſpent for their Preſervation.

That they are Part of *England* and ſubject to its Laws, appears from the common Caſe of an Incumbency here, being made void by Acceptance of a Biſhoprick in that Colony. Beſides, that in Ancient Time the Arch-Biſhop of *Canterbury* was Primate of *Ireland*, and had the Confirmation and Conſecration of Biſhops there. *Camden*'s *Brit.* pag. 735. and 765. 4 *Inſt.* 360. then 'twas urged that the Queſtion now was, whether it were a Dominion inferiour, or equal to and independent upon the Realm of *England*. That the conſtant Practiſe had been for the Lords here to examine the Decrees in their Court of *Chancery*. That the Refuſing of this Appeal would ſhake all thoſe Caſes thus determined. That every Appeal here from their Equity Sentences, (which have been very many) was an Argument againſt the Order of their Lords, and for the Receiving of this Appeal here. That this Thing hath been acknowledged, even by the Rebels there: For in Sir *John Temple*'s Hiſtory of the firſt Progreſs of the *Iriſh* Rebellion, written 1641. pag. 141. amongſt the ſeveral Propoſitions made by the *Iriſh* (then in a general Rebellion) theſe two are mentioned.

1. That by ſeveral Acts of Parliament to be reſpectively paſſed in *England* and *Ireland*, it ſhould be declared, that the Parliament of *Ireland* had no Subordination to the Parliament of *England*, but ſhould have ſupreme Juriſdiction in that Kingdom, as Abſolute as the Parliament of *England* here hath.

2. That the Act of 10 *Hen.* 7. called *Poyning*'s Act, and all other Acts expounding or explaining that Law, ſhould be Repealed; both which with their other dangerous Propoſitions were juſtly rejected. However, it ſhews their Opinion, that at that Time the Law was, or was taken and deemed to be, againſt

them in this Point. And there is as much Reaſon for keeping the final Judicature here, as there is for maintaining the Superiority and Obligatory Power over them in the Legiſlature.

'Twas farther urged, That the With-holding the *Iriſh* Lords from having the like Juriſdiction in their Parliament as the Lords in *England* have, in Judging upon Appeals and Writs of Error, was abſolutely neceſſary for the Preſerving of the Poſſeſſions of the *Engliſh* in *Ireland*. For thoſe of that Country muſt be ſuppoſed to incline to their own Intereſt, and cannot be ſuppoſed ſo much inclined to love and affect the *Engliſh* amongſt them: And that this Power of Judging here is co-eval with the very Conſtitution of the Government.

'Twas farther urged, That their Precedents returned did not concern the Point in Queſtion, except the two or three Caſes in 1661 and 1662. and two Appeals lately in 1695. that their Caſe of the Prior of *Lautkony* in 8 *H.* 6. *Prynne*'s Animadverſions 313, 314. was againſt them: The Prior having removed a Judgment in the *King's Bench* in *Ireland* into the Parliament there, which affirmed it, did bring a Writ of Error in the *King's Bench* in *England*, and they refuſed to meddle with it: The Reaſon was, becauſe the Writ of Error before the Lords there did not lie, and that it ought to have come hither immediately. And all the reſt of their Quotations in their Printed Caſe either prove nothing at all, or too much. For they are againſt the Allowance of Writs of Error in the *King's Bench* in *England*, and againſt the Legiſlature of *England*'s being able to oblige the People of *Ireland*: Both which have been approved by conſtant Practiſe. And therefore it was prayed, that the Appeal here might be allowed, and the Order of the *Iriſh* Lords might be vacated.

Argument for the Reſpondents.

On the other Side it was argued from 1 *Inſt.* 141. *Prynne*'s Animadverſions 286. and 4 *Inſt.* 12. that their Parliaments had the ſame Authority there in reſpect of making Laws for that Country, as the Parliaments have for *England*. That they have ever ſince 10 *Hen.* 7. re-enacted there ſuch ſubſequent Acts of *England*, as they thought good for them. And that they had the like Power of Appeals, Writs of Error and Impeachments, *&c.* and that the Cognizance of ſuch Appeals in *England* would produce great Inconveniencies, by making poor People to attend here; whereas they might with leſs Trouble and Expence have Juſtice at home. That this did agree with the Reaſons of that Ancient Statute, 4 *Inſt.* 356. that Perſons having Eſtates in *Ireland* ſhould reſide in that Kingdom, elſe Half of their Eſtates ſhould go to maintain the Forts there. That this Practiſe of receiving Appeals here would be Vexatious to the People of that Place: And that no Court could have Juriſdiction but by Grant or Preſcription: And that there could be no Pretence for either in this Place.

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Then was it ordered in theſe or the like Words:

Whereas a Petition and Appeal was offered to the Houſe the — Day of — laſt, from the Society of the Governor and Aſſiſtants London *of the new Plantation in* Ulſter *in the Kingdom of* Ireland, *againſt a Judgment given by the Lords Spiritual and Temporal of* Ireland *in Parliament there Aſſembled, on the — Day of — laſt, upon the Petition and Appeal of* William *Lord Biſhop of* Derry *againſt the Decree or Orders made in the ſaid Cauſe in the Court of* Chancery *there: Whereupon a Committee was appointed to conſider of the proper Method of Appealing from Decrees made in the Court of* Chancery *in* Ireland; *and that purſuant to the Orders of the ſaid Committee, and a Letter ſent to the Lords Juſtices of* Ireland, *by Order of this Houſe, ſeveral Precedents have been tranſmitted to this Houſe by the ſaid Lord Juſtices; Copies whereof were ordered to be delivered to either ſide: After Hearing Counſel upon the Petition of the ſaid Society of* London, *preſented to this Houſe, praying that they might be heard as to the Juriſdiction of the Houſe of Lords in* Ireland, *in receiving and judging Appeals from the Chancery there, as alſo Counſel for the Biſhop of* Derry; *after due Conſideration of the Precedents, and of what was offered by Counſel thereupon; it is ordered and adjudged by the Lords Spiritual and Temporal in Parliament Aſſembled, That the ſaid Appeal of the Biſhop of* Derry *to the Houſe of Lords in* Ireland, *from the Decree or Orders of the Court of Chancery there made in the Cauſe, wherein the ſaid Biſhop of* Derry *was Plaintiff, and the ſaid Society of the Governor and Aſſiſtants* London *of the new Plantation in* Ulſter *in* Ireland *were Defendants, was* coram non judice, *and that all the Proceedings thereupon are null and void, and that the Court of Chancery in* Ireland *ought to proceed in the ſaid Cauſe, as if no ſuch Appeal had been made to the Houſe of Lords there; and if either of the ſaid Parties do find themſelves Agrieved by the ſaid Decree or Orders of the Chancery of* Ireland, *they are at liberty to purſue their proper Remedy by way of Appeal to this Houſe.*

Judgment for the Appellants.

Sir Cæſar Wood, alias *Cranmer,* verſus *Duke of Southampton.*

APPEAL from a Decree in Chancery; the Caſe was thus; Sir *Henry Wood*, the Appellant's Unele, makes a Settlement in Conſideration of a Marriage to be had between his Daughter *Mary* and the Duke, *&c.* to the Uſes following, *i.e*, in Truſt to receive and pay out of the Profits 450 *l.* a Year to the Lady *Cheſter*, for the Education and Maintenance of his Daughter, till twelve

1 Ver. 338. Conſtruction of a conditional Limitation upon a Marriage, *&c.*

twelve Years of Age; then 550 *l.* a Year till Marriage, or ſeventeen Years of Age, which ſhould firſt happen: And in Truſt to pay the Reſidue of the Profits to the Duke after Marriage, he firſt giving Security to the ſaid Truſtees to provide Portions and Maintenance for the Daughters of that Marriage equal to the Sum he ſhould receive; and in caſe there ſhould be none, then the ſame Money to remain to the Reſpondent; and if the ſaid *Mary* ſhould die before Marriage, or Age of ſeventeen Years, to ſuch Uſes as Sir *H. W.* ſhould appoint; and if *Mary*, after Sir *Henry*'s Death, die under ſixteen, the Reſpondent then unmarried to any other Woman, or after and before ſeventeen, the Reſpondent then living and unmarried; or if before ſeventeen ſhe ſhould marry any other, or if ſhe ſhould refuſe the Reſpondent, then 20000 *l.* out of the Profits to the Duke.

But if the ſaid Marriage ſhall take effect after *Mary*'s Age of ſixteen Years, and ſhe ſhall have Iſſue Male by the Reſpondent, then for the better Settlement of the Premiſſes upon the Iſſue Male, and a more ample Proviſion and Maintenance for the Reſpondent and his Wife, and the longeſt Liver of them, in Truſt for the ſaid Duke and *Mary*, for and during their Lives, and the Life of the longer Liver of them; and after their Deaths, to the firſt Son, *&c.* in Tale Male; and for Default of Iſſue Male, to the Daughters; and for Default of ſuch Iſſue, in Truſt for ſuch Perſons only as Sir *Henry* ſhould appoint; and in Default thereof, to the Right Heirs of Sir *Henry*.

Sir *Henry W.* at the ſame Time makes his Will, tho' dated after the Settlement, reciting that he had ſettled the Premiſſes upon the Duke and *Mary* for their Lives, and the Life of the longer liver of them, *&c.* and confirms it; and in Caſe the ſaid Marriage ſhould not take effect according to the Limitations of the Settlement; or if the ſaid Reſpondent ſhould die without Iſſue by *Mary*; or if he have Iſſue by her, and that Iſſue die without Iſſue; then the Remainder to *Mary* for Life, and afterwards to her firſt Son; and after ſeveral mediate Remainders, then to the Appellant for Life, *&c.* and after to *Thomas Webb*, *&c.*

Sir *Henry Wood* dies; the Marriage between *Mary* and the Duke afterwards takes effect upon her Arrival to Years of Conſent: And they lived in that State till ſhe was near ſeventeen Years of Age, and then ſhe dies without Iſſue.

The Court of *Chancery* decreed the Profits of the Eſtate to the Duke for Life.

Argument for the Appellant.

It was argued for the Appellant, That here was a precedent Copulative Condition; that if the Marriage take effect after ſixteen, and there be Iſſue, then to the Duke; and neither of theſe being in the Caſe, the Decree is not conſiſtent with the poſitive Words of the Settlement: For that the Duke was to have it upon no other Terms. That by this Settlement the Duke was thus provided for:

1. If the Marriage did not take effect, by *Mary*'s Refuſal or Taking another Husband, the Duke was to have 20000 *l.*

2. If the Marriage did take effect, and Iſſue was had, then the Duke was to have an Eſtate for Life, but not otherwiſe. That the Words are plain and certain, that there muſt not only be a Marriage, but Iſſue Male between them. That tho' it ſhould be agreed to be a good Marriage within the Intention of the Settlement, ſhe living till after ſixteen Years of Age, yet when a Condition Copulative conſiſting of ſeveral Branches (as this doth) is made Precedent to any Uſe or Truſt, the intire Condition muſt be performed, or elſe the Uſe or Truſt can never riſe or take place: And it is not enough that one Part only be performed.

As to the Objection from the Intention of the Parties, 'twas anſwered, That no ſuch Intention did appear, or reaſonably could be collected from any Thing in this Deed or Will: And it would be too great a Violence to the Words, to break that Condition into two, which is but one, according to the plain and natural Contexture and Senſe of it. Objection anſwered.

It hath been ſaid, That if the Duke cannot take an Eſtate for Life in the Truſt, unleſs he had Iſſue Male by the Ducheſs, then ſhe her ſelf could not take for Life by that Truſt, unleſs there were Iſſue Male, for that their Eſtates are limited together; and then the Conſequence would be, That if there were Daughters and no Sons, the Daughters would have the Truſt of the Eſtate in their Mother's Life-Time, and their Mother nothing, which could not be the Intent of Sir *Henry Wood*. Objection

To this it was anſwered, That the ſame ariſes from a plain Miſtake, and a Suppoſition that the Daughters (if any) ſhould take, tho' there never were a Son; whereas the Limitation to the Daughters is under the ſame precedent Condition, as the Limitation to the Duke and Ducheſs is: For the precedent Copulative Condition uſhers in the whole Limitation of the Truſt, ſo that the Truſt to the Daughters could no more ariſe, without Iſſue Male born, than the Truſt to the Duke and Ducheſs. Anſwered.

And whereas 'tis pretended, That at this Rate the Duke and Ducheſs were to have had no Subſiſtence till the Birth of Iſſue Male, which might be many Years: It was anſwered, That this was a plain Miſtake of the Law: For this Truſt being by the Deed and Will thus limited upon this precedent Condition of having Iſſue Male, they, whoſe Eſtates in this Truſt are thus limited upon this Condition, can take nothing till the Condition be performed by Marriage and Iſſue Male: And then by the Rules of Law, till ſome of thoſe Perſons to whom the Truſt was limited could take, the Truſt of the Eſtate deſcends to the Heir at Law, and ſhe was intitled to the Profits, till the Precedent Condition ſhould be performed, or become impoſſible: And if the Condition had been performed, the Truſts would have taken effect; and being not performed, but becoming impoſſible by the Ducheſs's Death before ſhe had Iſſue, the ſubſequent Truſts take effect upon her Objection anſwered.

Death. Beſides that, it is purſuant to the Rules of the Common Law, which gives to the Husband no Eſtate for Life in the Wife's Inheritance, unleſs he have Iſſue by her born alive; wherefore it was prayed that the Decree might be reverſed.

Argument for the Reſpondent.

Then it was argued on the Behalf of the Reſpondent, That Sir *Henry Wood* by the ſame Settlement directs, that if the Duke died before his Marriage with her, then the Truſtees ſhould diſpoſe of the Profits of the Premiſſes to the Lord *George Palmer*, the Duke's Brother (in Caſe the Brother married her) and to the ſaid *Mary* for their Lives, and the Life of the longer Liver of them; and from and after the Deceaſe of the Survivor of them, then to their Iſſue in Tail Male, *&c.* without adding any Words of a preceding Condition; and yet ſays, *In like Manner, and for the like Eſtates, as he had appointed for his ſaid Daughter and the Duke, in Caſe of their Marriage:* Which plainly evidences his Intention to be, That the ſaid Duke and the Lady *Mary* ſhould have the Profits during their Lives, altho' they ſhould never have Iſſue Male, as the Brother would have had in caſe he had married her.

Then 'twas urged, That Sir *Henry Wood*'s Appointing the Surplus of the Profits, over and above her ſaid Maintenance, for the Benefit of the Duke until his Marriage, ſhows the Intent: For that it can't be imagined that he ſhould be provided for before his Marriage, and left deſtitute of all Support after it, unleſs he had Iſſue Male by her. Nay, his Intention of Kindneſs to the Duke was proved further, by giving him 20000 *l.* in caſe ſhe refuſed to marry him, or died before her Marriage.

Objection anſwered.

And as to the Pretence of its being a Condition precedent, it was anſwered, That unleſs that Paragraph be made to interfere with it ſelf, the Duke will be intitled to an Eſtate for Life, if there were no other Clauſe in the Deed.

For firſt, It's ſaid, *That for a more full and ample Proviſion for the ſaid Duke and his Wife, the Truſtees, &c.* Which Words (according to the Conſtruction of the Appellant's Counſel) muſt be uſeleſs and void, unleſs the Duke were not after Marriage to have as great, if not greater Supply, than he had before the Marriage.

Then 'tis ſaid, *That they ſhould be ſeized in Truſt for the Duke and his Wife, and the Survivor of them, for and during their natural Lives, and the Life of the longer Liver of them.* And from thence 'twas argued, That the Meaning and Import of the Words (*for and during*) can be nothing leſs than the whole Duration and Continuance of their Lives from and after Sir *Henry*'s Death and their Marriage.

Then the Will of Sir *Henry* proves the Intention, for that it recites, That he had ſettled, from and after his Deceaſe, the Premiſſes in Truſt for the Duke and the ſaid *Mary* during their Lives and the Life of the longer Liver of them, and takes no Notice of the pretended precedent Condition: Which ſhows that he deſigned

ſigned them the Profits immediately after his Deceaſe and the Marriage.

Then in the Limitations over, they are not to take any Benefit of or by the Premiſſes, until the Death of the Duke and his Wife without Iſſue. Therefore it muſt be underſtood, that the Profits in the mean Time ſhould remain to the Duke and his Wife, or the Survivor of them; And then it was farther obſerved, That the Duke comes in as a Purchaſer upon as valuable a Conſideration as any in the Law, *viz.* Marriage; and the Limitation over to the Reſpondent is a voluntary Settlement.

And as to the Objection of the Marriage being before Sixteen, it was not much inſiſted on the other ſide: And in Reaſon cannot be; becauſe her continuing married till after Sixteen doth fully ſatisfy the Intent of the Deed, in Reference to this Matter. And many other Reaſons were urged from the Intent of the Parties, and the Nature of the Intereſt, the ſame being a Truſt Eſtate, and proper for Equity to conſtrue. And upon the whole it was pray'd that the Decree might be affirmed; but the ſame was reverſed. Decree reverſed.

Sir Cæſar Wood, alias *Cranmer*, verſus *Thomas Webb.*

APPEAL from a Decree in *Chancery*; the Caſe was founded upon the next preceding: The Reſpondent was one of the Coheirs of Sir *Henry Wood*, and claimed a Moiety of the Profits of the Premiſſes during the Duke's Life; and the ſame was decreed accordingly. And now it was argued on the Behalf of the Appellant, That in this Deed there was no Appointment to the Reſpondent, till after the Death of the Appellant and his Iſſue: That all the Pretence for *Webb*'s Claim was, That the Truſt to the Appellant was not to take effect till the Duke's Death, altho' the ſaid Duke had no Intereſt in the Eſtate, as hath been adjudged by the ſupreme Judicature of the Realm. That by the whole Purport and Deſign of the Settlement and Will, and the poſitive Words of it, Sir *Henry Wood* intended the ſaid Truſts in Succeſſion and Order, as they are mentioned. That the Deſign of the whole, was not to give any Thing to the Reſpondent, till after all the mediate Limitations were ſpent. Profits how to go under a contingent Limitation. Argument for Appellant.

It was argued on the other ſide with the Decree, That this Right of the Reſpondent to a Moiety as long as the Duke lives, is a neceſſary Conſequence of the Lords Judgment in the other Caſe. That the ſame is founded upon fixed and eſtabliſhed Rules of Law; as that an Heir is not to be diſinherited by Conſtruction or Implication: Argument for Reſpondent. Heir not to be diſinherited by Implication.

cation; but by plain and expreſs Words; nor will the Law give away an Eſtate, or make it to Commence ſooner than the plain and expreſs Words will warrant. That wherever an Eſtate is limited in Remainder, that depends upon a Contingency or a Condition precedent, there, till the Condition be performed or Contingency happens, that Eſtate cannot Commence. That this was the Foundation of the Argument for the Appellant, in the other Caſe. And the ſame Rules hold here: For here is a Precedent Condition; for after the Marriage once had, the Duke muſt die, and die without Iſſue, or that Iſſue die without Iſſue, before the Appellant can take.

The Owner ſays that the Appellant is not to have it till then. That there is not one Reaſon which can be urged againſt the Duke, but may with equal Force be urged againſt the Appellant in this Caſe. That the Reſpondent claims not by the Settlement, but as a Coheir, to have that which is not diſpoſed of; and what is not ſo diſpoſed, muſt deſcend or reſult for the Benefit of the Heirs. Wherefore it was prayed that the Decree ſhould be affirmed; and it was affirmed.

Decree affirmed.

The Biſhop of Exeter & al' verſus *Sampſon Hele.*

Writ of Error upon a Judgment in a *Quare Impedit* in *C. B.* affirmed in *B. R.*

The Caſe upon the Record was thus:

3 Lev. 313. Lutw. 1094. 4 Mod. 134. 2 Salk. 539. Carth. 311. *Quare Impedit.* How the Sufficiency in Learning of the Preſentee to a Benefice is to be tried.

HELE brings his *Quare Impedit*, as ſeiſed of the Manor of *Southpole* in *Com' Devon'*, to which the Advowſon of the Church of *Southpole* belongs, in his Demeſne as of Fee, and ſo being ſeiſed he preſented thereunto, when Vacant, *John Ult'*, his Clerk, who at his Preſentation was admitted and inſtituted; that it became void by his Death, and belonged to him to preſent; and that the ſaid Biſhop and *Gauwyn Hayman* hinder him, *ad dampn' &c.*

The Defendants came and defend *vim & injur' quando, &c.* and the Biſhop ſays, *Actio non, quia dicit*, that the Church is within his Dioceſe, and that he claims nothing in it but as Ordinary; that 'tis a Benefice with Cure of Souls; that 15 *Aprilis Anno Willielmi & Mariæ ſecundo* it became void by the ſaid Incumbent's Death, he being Ordinary, after which Vacancy, and within ſix Months *prox' poſt mortem præd' J. V.* viz. 19 May *eodem Anno*, the Plaintiff preſented to him one *Francis Hodder* as his Clerk, which ſaid *Francis* was a Perſon *in Literatura minus ſufficiens ſeu capax*

ad habend' dictam Eccleſiam. Super quo præd' Epiſc', as Ordinary of the Church aforeſaid, did according to the Eccleſiaſtical Laws examine him of his Ability and Fitneſs in that Behalf, *ut de jure debuit*, and upon ſuch Examination, he found him to be a Perſon *in Literatura inſufficient' ac ea ratione fore perſonam inhabil' & minime idoneam ad habend'* the ſaid Benefice with Cure of Souls, *per quod* the ſaid Biſhop as Ordinary did refuſe him; of which, after the ſaid Refuſal, the Biſhop within the ſix Months, did give the Plaintiff Notice, *viz.* 20th *June Anno ſupradict'*, and that he might preſent another Perſon to the ſaid Church; that the Plaintiff did not preſent any other within the ſix Months, *per quod* it belonged to the Biſhop, as Ordinary of the Place, to Collate a fit and proper Perſon; and thereupon he did Collate *Gauwin Hayman*, who was Inſtituted and Inducted. *Et hoc parat' eſt verificare; unde pet' Jud', &c.*

The Incumbent pleads the ſame Plea, Mutatis mutandis.

The Plaintiff replies, That *Hodder* at the Time of the Preſentation, and long before, was Vicar of the Parochial Church of *Uxborough* in *Com' præd'*, and to that Vicarige lawfully Admitted, Inſtituted and Inducted, *& homo Literatus infra Sacros ordines conſtitut' & in verbo Dom' Doct' & inſtruct', & poſt Doctrinæ & Literat' examen ordines Sacerdotales per ordination' Epiſcopalem adeptus fuit, & intuitu Spiritualis Doni & favente Deo in ea parte contingent' ad prædicand' verbum Dei in & per Dioceſim* Exon by *Anthony* late Lord Biſhop of *Exon Licentiat'*, *curam habens & exercens Animar', & Divino Servitio per multos Annos aſſidue incumbens, & Divinum Servitium Celebravit & adhuc Celebrat, & ad Divina Servitia Celebrand', ſcil' in legendo, Orando, Prædicando, & Sacra Miniſteria miniſtrand', ſatis & ſufficienter Literatus vixit apud Southpole præd'. Et hoc' par' eſt ver'; unde petit Jud', &c.*

The Defendants rejoin, That *proteſtando*, that *Hodder* was never Vicar of *Uxborough*, nor in Orders, nor Licenſed to Preach; *pro placito* they ſay, that *Hodder* when preſented was a Man illiterate; and that they are ready to aver, *ubi & quando prout curia, &c.*

The Plaintiff ſur-rejoins, That *Hodder* was Vicar in Orders, and Licenſed, *prout; & hoc petit quod inquiratur per patriam*; and the Defendants demur; *& Jud' pro quer', & affirm' in* B. R.

Argument for Plaintiff in Error.

It was argued on behalf of the Plaintiffs, in the Writ of Error, that this Judgment and the Affirmance of it were Erroneous.

For, That the Ordinary had in this Caſe a Power of examining this Preſentee, notwithſtanding their Pretence of Orders and Licenſe, and the former Examination by Dr. *Sparrow* late Biſhop, and conſequently their Replication and Surrejoinder are naught, for they rely upon that and nothing elſe.

Whether Ordination be a ſufficient Proof of Learning.

'Twas inſiſted on below, That a Parſon once Ordained is certainly preſumed to have ſufficient Learning for any Cure of Souls. Nay, that ſuch Examination upon his Ordination ſhall conclude any ſucceeding or other Ordinary from examining ſuch a Perſon when preſented to a Benefice. But this is contrary both to Reaſon and Law: And ſo agreed by moſt of the Judges, who delivered their Opinions for the Plaintiff in the Action below.

'Tis againſt all Reaſon and Senſe, That becauſe one Ordinary thought him able to take Orders and Preach in his Dioceſe, therefore another muſt deem him able and ſufficiently Learned (tho' he knows the contrary) to accept a Benefice in his Dioceſe. 'Tis Abſurd, that upon a Preſentation he is to be examined, but not refuſed, tho' found *inhabilis*: And this becauſe he was in Orders, and he could not be preſented unleſs in Orders. And yet tho' in Orders, if he be preſented, he muſt be examined, but to what Purpoſe paſſeth all Underſtanding, if his Prieſthood or Orders preſumed him to be qualified? 'Tis likewiſe to ſuppoſe Learning and Ability to be an inſeparable Quality; That an ordinary Scholar can never become leſs ſo. By the old Law, the Biſhop had two Months Time to examine. 2 *Roll's Abr.* 354. By *Hob.* 317. He hath a convenient Time, and by *Can.* 1 *Jac.* 1. *cap.* 95. the two Months is reduced to 28 Days: And the Ordinary both in Conſcience and by the Obligations which his very Order doth import, is obliged to Judge for himſelf as well as to Examine. The contrary is Repugnant to his Office of a Judge, to be forced or compelled to inſtitute every Preſentee, fit or unfit. Beſides the Ordinary *pro Tempore* hath the particular Care of all the Dioceſe, and during a Vacancy is to take care of ſupplying every particular Cure within his Diſtrict: Then when he admits and inſtitutes, the very Form of Words is, *Accipe curam meam & tuam*; which renders it more Abſurd, that *nolens volens* he muſt transfer his Cure to a Man not able in his Judgment to execute it.

'Tis againſt the Rule of Law, for that the Words of it are expreſs, *Articuli Cleri, cap.* 13. and this *Coke* declares to be Affirmative of the Common Law; *Item petitur quod perſonæ Eccleſiaſt' quas Dominus Rex ad beneficia præſentet Eccleſiaſtica, ſi Epiſcopus eas non Admittat, ut puta propter defectum Scientiæ, vel aliam cauſam rationabilem, non ſubeant examinationem Laicar' perſonar' in caſibus antedictis prout his temporibus attentetur de facto, contra Canonicas ſanctiones, ſed adeant Judicem Eccleſiaſticum, ad quem de jure pertinet pro Remedio, prout juſtum fuerit, conſequendo, reſponſ. de Idonietate perſonæ præſentatæ ad beneficium Eccleſiaſticum pertinet Examinatio ad Judicem Eccleſiaſticum, & ita eſt hactenus uſitatum, & fiat in futurum.*

Here is *Idoneitas perſonæ præſentatæ*; and the Words of the Writ are *quod permittat præſentare Idoneam perſonam.* And if the Preſentee were not a fit Perſon, no ſuch Writ can be maintained.

Then my Lord *Coke* in his Comment upon that Statute in 2 *Inſt.* 631, 632. ſaith, that there may be diverſe Exceptions to Perſons preſented; as Baſtardy, Villenage, Outlawry, Excommunication, Laity, Under-age, or Criminal and Lewd in his Converſation, or Inability to diſcharge his Paſtoral Duty; as if he be Unlearned. And the Examination of the Ability and Sufficiency of the Perſon preſented belongs to the Biſhop, who is the Eccleſiaſtical Judge: And not a Miniſter; and he may and ought to refuſe the Perſon preſented, if he be not *Idonea perſona*: And if the Cauſe of Refuſal be Default of Learning, Hereſy or the like, belonging to the Knowledge of the Eccleſiaſtical Law; then he muſt give Notice to the Patron. So that Default of Learning is by him (who was no great Friend to the Juriſdiction of Court Chriſtian) agreed to be ſubject to the Eccleſiaſtical Inquiry. And then in Pleading he muſt ſhow the Cauſe of Refuſal; and the Party may deny the ſame; and then the Court ſhall write to the Metropolitan, or to the Guardian of the Spiritualties, *ſede vacante*, to certify if the Cauſe be thus; and his Certificate is concluſive. If the Preſentee be Dead, it ſhall be tried by a Jury, 15 *H.* 7. 7. the Biſhop is declared to be a Judge, and not a Miniſter in this Caſe of Examining a Man's Ability. He is a Judge in this Caſe, as he is in Caſe of a Reſignation; for an Ordinary may refuſe it, and without his Acceptance, 'tis no Reſignation, and muſt be ſo pleaded. *Noy* 147. *Bro.* tit. *Bar.* 81. *&* 2 *Cro.* 197. and ſo agreed, even in the Caſe of *Leach* and *Thompſon*. In *Reg.* 53. is a Conſultation upon this very Surmiſe that Inability *ad Retinend' beneficium propter Crimina* belongs to Court Chriſtian; and that the Ordinary is Judge thereof: Which is much ſtronger than our Caſe, becauſe there was a Freehold veſted by Induction. But this hath been agreed by that Court, from whoſe Judgment the preſent Appeal is, that a Refuſal may be upon Inſufficiency appearing upon an Examination, upon a new Preſentation. And conſtant Practiſe proves it.

Exceptions in Law to a Preſentee.

Hob. 296.

The greater, if any Doubt is upon the Plea, if good, it ſays, that he was Examined, and upon Examination was found incapable.

The Exception taken to it is, that it doth not ſet forth the particular Parts of Learning, in which he is deficient; that the Temporal Court may Judge, if it were a ſufficient Cauſe of Refuſal; which is to change and turn it *ad aliud examen*, what Learning is requiſite for a Preſentee to be Benefic'd. They would not have the Ordinary to determine what Qualifications a Perſon ought to have in order to take a Benefice, but the Judges in *Weſtminſter-hall*. They can have no Colour for this Pretence, but that the Ordinary may have refuſed, when competently Learned in their Opinions: And they cannot ſay that the Law hath ſettled any Rules or Meaſures of Learning requiſite. Some ſay, Latin is not requiſite ſince the Liturgy is now in *Engliſh*, and therefore they would Judge of it. Others ſay, the leſs Learning the better Preacher, if he can Read, and Pray, and Preach, and be indued with Spiritual Gifts;

Objections anſwered.

Gifts; and ſo is their Replication. Others ſay, that the Ordinary's Judgment muſt be ſubmitted to the Judge's Opinion of the Proportion of Knowledge neceſſary. Then they have a Popular Pretence, that this will give the Biſhops too great a Power of Refuſal, and ſo reſtrain Patrons from their Privilege of Preſenting, and thereby make themſelves Collators. But, there's no Danger of that, becauſe there muſt be Notice and a convenient Time for another Preſentation. And the Danger of this Reſtraint is as much the other way; for then the Temporal Courts are to do it; and its much at one to the Patron, which is to declare the Inability, the Ordinary or Temporal Courts. On both ſides it muſt be agreed, that Default of *Literature* is a good and juſt Cauſe of Refuſal: The Queſtion is, who ſhall Judge of it? It is ſaid, *minus Sufficiens in Literatura, & ea ratione inhabilis*, i. e. (it being indefinite) *in omni Literatura neceſſaria.*

But they Cavil at the Word *minus ſufficiens*, as if that agreed him ſomewhat Learned, and forget that 'tis ſaid *ac perinde incapax.* And *minus ſufficiens* is in Lawyer's Latin totally inſufficient; and ſo 'tis uſed in all Demurrers to Declarations, Pleas, Replications, *quod Narr' vel placit' præd' & Materia in eodem content' minus ſufficient' in Lege exiſtunt, ad quem vel quod* the Party *neceſſe non habet nec per Legem terræ Tenetur aliquo mode reſpondere*; i. e. 'tis good for nothing, 'tis inſufficient; the Court in their Judgments upon the Inſufficiency of the Plea do always ſay, *quia minus ſufficien' exiſtit.*

Then it was argued, That it is a good Plea to all Intents and Purpoſes, from the Nature of the Thing, and the Impoſſibility of making it more particular and certain. 2. From the Sufficiency of it to all Intents and Purpoſes of Trial. 3. From the Precedents and thoſe of Antiquity which warrant this Form of Pleading. 4. From the Miſchiefs and Inconveniencies which muſt follow and enſue, if a greater Particularity were required.

The Plea ſufficiently certain.

1. From the Nature of the Thing, and the Impoſſibility of making it more particular and certain; if the Biſhop were bound to ſet down in particular, and at large, every Point of Learning wherein this poor Wretch was and is deficient, 'twould be a Pleading like to a Juſtification of an Action done by a private Perſon; and not like to the Pleading of the Act of a Judge, which this is: 'Twould be ſo large as to render it impoſſible for to join an Iſſue thereupon; and then they would have demurred with a Cauſe, becauſe *multiplex, duplex, incertum, & perplex'*, and the reſt of our uſual *Adjectives* upon thoſe Occaſions: The Aſſignment of ſeveral and many Particulars would have been double, and good Cauſe of Exception; becauſe one Particular might be found True, and another not: And the Aſſignment of one Particular would have been adjudged inſufficient; for then they would have ſaid, that Learning is of a complex Nature; and if a Man ſhould fail in anſwering any one Particular, tho' common Queſtion, yet he might be qualified in general: And therefore the Aſſignment of

one Defect, tho' never ſo groſs, ſhall not make a Clerk *minime capax*, and therefore no good Plea. For, if a Particular be Aſſigned, that would not prove a general Defect of Knowledge, according to the Words of the Law; which is the only Thing that could make him incapable *ad habend' beneficium cum Curia Animar'*, and therefore the Biſhop as a Judge returns him *in Literatura inſufficiens, & ea de cauſa minime capax:* And the ſpecial Inſtances would have been Evidences upon a new Trial, or Examination before the Archbiſhop.

Now this Cauſe of Refuſal diſtinguiſhes the Caſe from all others that they can inſiſt upon. All other Inabilities of a Clerk depend upon one ſingle Point, as Baſtardy, Villenage, Outlawry, Excommunication, Layman, Under-Age or Eccleſiaſtical Infamy. So all Crimes muſt have their Foundation from a particular Act, as Adultery, Perjury, Simony, *&c.* In theſe it ſhall not be enough to Plead that he was *inhabilis* generally, or *criminoſus* generally, *& ideo inhabilis*; becauſe no Body can be *criminoſus*, but he that hath done ſome particular Crime; and that is to have a ſeveral Trial according to its reſpective Nature: If it be an Eccleſiaſtical Offence, then there is a particular Method of Trial; if a Temporal, then another. And ſo ſays *Coke*, 2 *Inſt.* 632. and therefore a Particularity is required there: But here 'tis all triable by the ſame way, *viz.* a new Examination before the Archbiſhop. Here the Matter it ſelf admits of no greater Certainty; for that 'tis a general Deficiency of Learning only, which can make an Incapacity of diſcharging the Paſtoral Office. It is a Matter that muſt appear by a Variety of Queſtions, and cannot be proved by any one ſingle Inſtance whatſoever.

This is the true Reaſon and Difference why in ſeveral Caſes general Pleading hath been denied, and why in this Caſe it hath been always uſed, and never excepted againſt.

Then it was argued, That this Plea was ſufficient to all the Intents and Purpoſes of Trial and Determination.

By our Law that Plea is ſufficiently certain, which may be tried without inveigling either Court or Jury; that is, it muſt be intelligible and plain. And this ſurely is plain enough: The Ordinary had a Power to refuſe him for want of Learning ſufficient to enable him to diſcharge his Paſtoral Office; he Pleads that he was *Minus ſufficien' in Literatura*; this is to be tried by the Certificate of the Archbiſhop, or the Guardian of the Spiritualities, during a Vacancy. And that is evident by 39 *E.* 3. 1, 2. 40 *E.* 3. 25. and from *Specot*'s Caſe, 5 *Rep.* 7.

There never was an Objection made to the Uncertainty of any Plea, if the Matter could be fairly reduced to an Iſſue for a Trial; now here the Court might certainly have written to the Archbiſhop, to have known *utrum* this Creature were *minus ſufficiens in Literatura, & ea Ratione inhabilis*, and the *actus Curiæ* of the Biſhop would have been Evidence before his Grace, and he might

have certified that he was, or that he was not ſufficiently Learned. No, ſay they, the Court muſt not write to the Archbiſhop to know that, till it be ſaid in what Points of Learning he was defective? And if theſe ſhall be thought material Parts of Learning for a Rector, then they muſt write to know if *Hodder* had them or not? But if they think them not material for the Qualifications of a Paſtor, they muſt not write at all. This is the true *Engliſh* of the Argument. But it was argued, That the Temporal Court is only to judge, that the Cauſe of Refuſal, if true, was a ſufficient Cauſe: And the Books are, that a general Default of Learning is a good Cauſe; and this the Archbiſhop is to try: And this is certain enough for to make an Iſſue or Queſtion proper for that Trial.

Nicety of pleading the Judgments of Courts leſſened by Degrees.

Beſides a greater Latitude and Generality hath of late been allowed in pleading of Proceedings in Courts, and before Judges, than formerly. In ancient Days, if a Man pleaded a Judgment in a Court in *Weſtminſter-hall*, they ſet forth the whole; then they came to allow of a *Taliter fuit proceſſum*, and an Abridgment of the Proceedings; then came a *Recuperavit* only: And this was becauſe that all Proceedings in the ſuperiour Courts were to be preſumed regular, till the contrary were ſhewn. But this was denied a long while to inferiour Courts, becauſe theſe were tied to ſtricter Forms, and therefore were ſtill forced to ſet forth the whole: Then they allowed a *Taliter fuit proceſſum* for them, provided ſtill they were Courts of Record. But now they allow it in pleading of a Juſtification upon a Recovery in an Hundred Court; becauſe the whole muſt be given in Evidence. So that ſuch a formal Nicety in Pleading is not generally required now as was formerly. Beſides, in Matters triable by the Spiritual Law, there is always leſs Particularity required in Pleading, than in others triable in the Courts Temporal: As in Baſtardy, Divorce, Depoſition, Literature, Profeſſion and the like, its enough if ſo much be alledged, that they may write to know whether the Fact be ſo or no; and upon a Return thereof that 'tis ſo, they can give Judgment. Now if his Grace my Lord Archbiſhop, in this Caſe, upon Examination had returned that this Preſentee was *in Literatura minus ſufficiens*, as undoubtedly he would, (and ſo the Plaintiff thought, otherwiſe he would have joined Iſſue) and ſo *ea occaſione inhabilis*, then unqueſtionably Judgment muſt have been for the Plaintiff in Error: For Default of Learning is a good Cauſe of Refuſal, and muſt be agreed to be ſo. The Rule laid down by my Lord *Anderſon*, 3 *Leon.* 200. is, That in Matters triable by our Law, all things Iſſuable ought to be ſpecially alledged, in order to have a convenient Trial: But in Matters Spiritual the Law is otherwiſe: Becauſe there's no Peril in the Trial. And therefore if certain enough to ground a Certificate, it is ſufficient.

My Lord *Hob.* 296, in *Slade* and *Drake's* Caſe, ſaith, That in pleading a Divorce, you muſt ſhew before whom it was, 11 *H.* 7. 27. but you need not ſhew all the Proceedings, as you ſhould of a Recovery at Common Law. And the Reaſon why you muſt ſhew before whom, is only that it may be known, who is to try and certify it. In *Burdell's* Caſe 18 *E.* 4. 29, 30. 'tis clear, that in all Spiritual Acts triable by the Spiritual Law, it is neceſſary to plead no more than what may give the Court ground to write to the proper Eccleſiaſtical Officer, and to judge by his Certificate. Now here is ground enough in this Caſe for the Archbiſhop to examine this Ignorant Perſon, for ſo he muſt be taken to be; for ſo he is found by one Ordinary, and he refuſes to be examined by the Archbiſhop. He is pleaded not to have Learning enough to capacitate him for a Cure of Souls: And that by one whom the Law hath conſtituted his Judge. 'Tis true, this is Traverſable and Triable by the Archbiſhop: But all thoſe Inſtances of his Inſufficiency that were taken in the Biſhop's Court, would be Evidences of the ſame before the Archbiſhop, proceeding in an Eccleſiaſtical Manner, tho' not ſo proper, tho' not poſſible to be ſet forth in the Temporal Court. This is not a general Return of a Perſon *inhabilis*, which might occaſion an Inquiry into all Sort of Diſabilities; but a ſpecial Plea of *inhabilis, quia inſufficienter Literatus*; and therefore no further Inquiry is neceſſary, than into the Learning of the Party, as Capacitates him for a Rector.

Precedents of Pleading.

It was in the third Place argued from the Precedents of Pleading in this Caſe and other Caſes of Pleading upon like Occaſions, and thoſe both Ancient and Modern.

40 *E.* 3. 25. In a *Quare Impedit* (as this is) the Biſhop pleads as here, That he examined the Clerk preſented, and found upon Examination *que il ne fuit ſufficiens* Letter'd; and thereupon alledges Notice to the Patron, *& per lapſum temporis* he juſtifies his own Preſentation. Upon this, there's no Diſpute but that thus far it was well pleaded; but the only Doubt was, whether the Words, *and ſo diſabled*, ſhould be added to the Iſſue? And they were ordered to be Part of the Iſſue in that Caſe: And ſo they ought to be in this Caſe; and ſo they are *& ea ratione inhabilis*. This Caſe is exactly parallel to that in Queſtion: And upon this Plea there was Iſſue joined, and the Trial was directed to be by the Guardian of the Spiritualities, *vacante Sede Cantuarienſi*. Nothing can be offered againſt this, only that 'tis Ancient, and the Law is changed: But by what Authority is hard to know. There is no Act of the Legiſlature to alter it. Much hath been done to help againſt Niceties in Pleading; nothing to require more. And *Bro. Quare Impedit*, 168. they were compelled to join Iſſue, able or not able, in that Reſpect.

39 *E.* 3. 1 & 2. *The Earl of Arundel* verſus *The Biſhop of Cheſter*, ſays the Book, tho' it appears plainly to be a Miſ-print, from the Name of the Church, and the Trial *per pais*, and the Antiquity of the Biſhoprick it ſelf. It muſt be the ſame, that in the *Abridgment* is called

called *The Earl of Arundel* verſus *The Biſhop of Exeter.* The Biſhop pleads as here; That he examined the Clerk preſented, and found him *perſona inhabilis* to have a Benefice in the Church; and Iſſue is joined upon that, which is ſtronger than ours, and a Trial by Jury is directed out of the County of *Cornwall*, becauſe the Clerk was dead. Here are two Caſes in which all the different Trials are taken that can be had; by the Guardian where the Preſentee was living, and by Jury when dead, becauſe he could not be examined: And in both theſe Caſes Iſſue is taken upon this Plea, and that in great Caſes, and after long Debate. And, according to Lord *Coke*, in this Reign the Law was pure and uncorrupt, and flouriſhed.

Then were urged Modern Precedents, *Mich.* 15 & 16 *Eliz. Rot.* 1941. *Molineux* verſus *Archiepiſcop' Ebor'* in a *Quare Impedit*, in which the Plea of the Archbiſhop is the ſame *in totidem verbis*, as here, *Perſona in Literatura minus ſufficiens, ſeu habilis ad habend' præd' Eccleſiam*, and there is no Exception taken to the Plea, but only Iſſue joined upon Notice, or no Notice, before the Lord Chief Juſtice *Dyer.*

Another Precedent there is *Hill.* 6 *Eliz. Rot.* 646. *Bodenham* verſus *Epiſcop' Hereford'*; there is the ſame Plea in Bar as here, That the Perſon preſented was *Perſona in Literatura minus ſufficiens ſeu habilis ad habend' aliquod Beneficium Sanctæ Eccleſiæ*; and then avers Notice to the Patron: And no Exception taken to the Plea, but Iſſue upon Notice.

Paſch. 6 *Eliz. Rot.* 714. *Paſchall* verſus *Epiſcop' Lond'*, *Quare Impedit*, the Ordinary pleads an Examination *de habilitate, honeſtate & doctrina ejus*; *& pro eo quod idem Epiſcopus invenit præd' Chriſtophorum fore criminoſum, & de non ſana Doctrina, ideo recuſavit*, and Notice; and even to that general Plea there's no Demurrer; but Iſſue upon Notice. 'Tis no Anſwer, that here was no ſolemn Judgment upon this very Point: For it doth rather inforce the Authority of the Precedents. It argues that the Law was taken to be ſo clear for the Validity of this Plea, that no Lawyer would venture upon a Demurrer; but rather would truſt to a Jury upon the Evidence of Notice. It argues it ſo conſtant a Courſe and Method of Pleading in theſe Caſes, that none was ſo hardy as to diſpute it.

38 *E.* 3. 2. *Perjurius* was alledged by the Biſhop in the Preſentee, and held to be well enough; but nothing of Manner, Time and Place, nor any Conviction of it mentioned; and yet this was admitted a good Plea. 2 *Rolls Abridg. Preſentment*, 356. and ſo ſays *Rolls*, it ſhall be, tho' in a Suit between the Ordinary himſelf and another, *Dyer* 293. 'tis cited *Bro. Quare Impedit*, 170. *Juſtice Rhodes* 3 *Leon.* 100. vouched a Caſe in 30 *E.* 1. out of a Manuſcript of the Lord *Catlin*, wherein upon a *Quare non Admiſit*, the Defendant pleaded that the Preſentee was *Schiſmaticus & Adulter*, and the Court commanded that he ſhould hold to one or other of them, for which he ſaid *Adulter*; from hence 'tis manifeſt, that the Court did not diſlike the Plea for the Generality, but the Doubleneſs.

And

And then it was ſaid, That after all theſe Precedents on this ſide, and many others which might be cited of the like Generality in other Caſes, 'twill be difficult to ſhew one ſingle Inſtance or Caſe in which this Matter of general Defect of Learning was ever pleaded otherwiſe; or any one Judgment againſt any Biſhop whatever, upon ſuch a Plea. For, tho' in ſome Caſes, which they ſay are parallel and ſimilar, tho' in truth they are not, as *Criminoſus* and *Schiſmaticus* hath been adjudged too general, yet this Plea of *Minime in Literatura ſufficiens, ac ea ratione incapax*, as it has always been uſed, without Alteration of Words, ſo has it never yet been excepted againſt; and in theſe Precedents of *E.* 3. before cited hath been thought good, and Iſſue joined thereupon. This is the uſual Courſe of Pleading.

This was the ancient Form of Pleading; and (as all thoſe ancient Pleas were) founded upon Reaſon; being ſuch as the ſubject Matter is capable of.

In the Caſe of a Coroner it is a good Cauſe to remove him, *quia fuit minime idoneus ad exequendum officium iſtud*, and no Charge of any particular Inſufficiency aſſigned. *Fitz. Nat. Brev.* 163. and there is no Queſtion but that 'twould be a good Cauſe, and ſufficiently certain. In a *Scire Facias* to Repeal, Vacate or Cancel Letters Patent for an Office in the Law, to ſay *in Legibus hujus Regni* Angliæ *minus ſufficient' inſtructus*, without aſſigning any particular Caſe or Statute that a Man blundered at, or was ignorant in. Suppoſe an Office in the Law, to which the King or a private Perſon hath the Nomination, and the Court refuſes to admit a Man ſo named, and an Action brought for that Refuſal, *&c.* would it not be a good Plea to ſay the Party was *minus ſufficiens in Scientia Legum & ea Ratione inhabilis*; and particular Inſtances are Evidences.

This is in the Negative, like a *Non fuit dampnificatus*, and there you never need to ſhew how; unleſs 'twere a particular Incumbrance at the Time of the Contract: Otherwiſe 'tis always a good Plea.

In *Non Compos* 'tis never ſhewn in particular wherein, or what Feats of Frenzy. *Non compos* implies that he had a general Defect, diſabling him at that Time to do an Act Obligatory and Valid. And that reſembles this; for you need not ſhew wherein; but the Particulars are Evidence.

The Reaſon of the Thing proves the Convenience and Solidity of the Diſtinction between Pleading a Negative and Affirmative. For Inſtance in this Caſe; the Negative pleaded implies an intire Denial of ſufficient Learning to qualify him for a Cure of Souls, and that juſtifies the Ordinary. And our Law Books are full of this Diſtinction. Mode and other Circumſtances of Quality, Time, and Place, are requiſite in Affirmative Pleas, none of which are neceſſary in Negatives. There might be cited infinite Numbers of Caſes to that Purpoſe, as *Mauſer*'s Caſe, 2 *Rep.* 4. *Broughton*'s Caſe, 5 *Rep.* 24. *Aſton* and *Hill*, 3 *Cro.* 253. *Hutchinſon* verſus *Lewſon*, 3 *Cro.* 393. *Wild* and *Dowſe*, *Latch* 159. And as the Difference between Pleading a Negative and an Affirmative.

Foundation of all those, is the 40 *E.* 3. 30. which is the Ground of all these, and many more subsequent Authorities to the like Effect. But besides, there's one Modern Case, 'tis *Church* versus *Brunswick*, *Sid.* 334. Bond to pay from Time to Time a Moiety of all such Monies as from Time to Time he should receive; and Payment of a Moiety generally, without shewing the Particulars in certain, was held a good Plea. And the Reason of that Judgment maintains the Rule now contended for: Which was, because 'tis of what he should receive from Time to Time: Otherwise if those Words had been omitted; because in that Case there would be a stuffing of the Rolls with a Multiplicity of Particulars: And the same Reason holds in the Case at Bar.

Then 'tis considerable, and deserving of a Thought, That if Learning be requisite to an Office Temporal, for a Slander in which an Action lies, there these very Words would bear an Action. As to say of a Judge, or the like, the very Words here mentioned, with Reference to his Office, 'twould be deemed Scandalous and Actionable: Now our Law will not allow uncertain, doubtful and ambiguous Words to be so.

General Pleading where allowable even in Affirmatives.

Even in Affirmatives our Law allows of general Pleading, where Particulars would be many: As in Bond for Performance of Covenants upon an Apprentice's Indenture for finding him Meat, Drink, Washing, Lodging and other Necessaries, held that *invenit* Meat, Drink, Washing, Lodging, *& alias res necessarias*, is a good Plea, tho' intirely uncertain what or how much. And the Reason is not only, because 'tis in the Words of the Covenant, for that Reason doth not always hold; for many Times you must shew how, and are forced to vary from the Words of the Covenant in the Breach; as in Case of quiet Enjoyment, Breach must alledge how and by whom, and under what Title the Man was disturbed: But there's another Reason, because the Particulars would be many.

Cryps versus *Sir Henry Baynton*, 3 *Bulstrode* 31. Case *sur assumpsit*, That *J.S.* being a Friend of the Defendant's, and coming to the Plaintiff's House, he fell sick; the Defendant, in Consideration that the Plaintiff would provide for him such Necessaries as he should want, he would *bene & fideliter solvere proinde*: The Plaintiff shews that he lay there two Months; that the Plaintiff provided him Necessaries amounting in Value to, *&c.* and held good without shewing the Particulars; to avoid a Multiplicity of Reckonings. So 'tis for a Surgeon's or Apothecary's Cure.

The subject Matter of a Plea to be considered.

Another Rule in Pleading there is, That a Certainty, or a Generality in Pleading shall be required, according to the Nature of the subject Matter pleaded. In pleading of Breach of a Statute Law, it's enough to use the Negative of the Words of such Statute, as it is in Case of a Covenant. And by the same Reason in this Case, where a Statute says the Bishop may refuse *propter defectum Scientiæ*, it's enough to say *in Literatura minus sufficiens*, especially when 'tis added *ac perinde inhabilis*.

Then

Then were urged the Miſchiefs and Inconveniences which muſt enſue and follow upon the Conſtruction which they would make, that this Plea is uncertain. For, their Reaſon only can be, as was ſaid before, that the Court may judge if it be ſuch a Deficiency of Learning as diſables to hold a Curacy of Souls. And this is the Reaſon all their Caſes go upon, and the Reaſon inſiſted upon below; *i. e.* in effect, that they muſt try it; not the Archbiſhop. The ſame Pretence is applicable to any other Defect: And 'twill in Conſequence confound Juriſdictions. 'Twill make an Enlargement of the Temporal, and Diminution of the Eccleſiaſtical Juriſdictions: Tho' both are founded upon the ſame *Engliſh* Laws, and of equal Age and Authority. Nor is it any Anſwer which they have alledged againſt this, That the Judgment at Law is not, that this *Hodder* ſhall have Inſtitution: But that a Writ ſhall go to the Metropolitan to require him to admit a fit Perſon upon Mr. *Hele*'s Preſentation; and that if Mr. *Hodder* be preſented, the Archbiſhop may refuſe him as inſufficient; and ſo the Archbiſhop is ſtill Judge of the Sufficiency. This looks plauſible: But they omit or forget the Conſequence; that if this Judgment ſtand, then if the Archbiſhop refuſe, the Temporal Courts muſt Judge upon another Writ, Whether the Cauſe of Refuſal were in a Point of Learning which they think requiſite (for he muſt not plead a general Defect of Learning, but mention Particulars, that they may judge of them) this is to ſubject even his Grace the Metropolitan to their Opinion, in an Affair within his own Juriſdiction and Conuſance. It is at laſt to enforce the Epiſcopal Judges to contradict their own Opinions; and to admit Perſons which they think not ſufficiently Learned. Tho' the firſt Judgment doth not directly place in *Hodder*, yet the next will, if the Archbiſhop prove of the ſame Mind. Now this is apparently the Conſequence, from the pretended Reaſon of the Judgment for them. And it is in effect to deny the old Law, that a Defect of Learning is a ſufficient Cauſe of Refuſal; and that the Ordinary is Judge of that Defect, and not the Temporal Court. Inconveniencies.

And then as to the Caſes objected, *Dyer* 254. the Biſhop of *Norwich*'s Caſe in a *Quare Impedit*, which is likewiſe in 2 *Rolls Abridg.* 355. where the Biſhop pleads, that the Preſentee was a common Haunter of Taverns and other Places, and Games unlawful, *ob quod, & diverſa alia Crimina conſimilia præd'*, the Preſentee *fuit Criminoſus, & ſic inhabilis, & non idonea perſona* and; this was held an ill Plea: But the Grounds and Reaſons of that Judgment were not for the Generality of the Plea; but becauſe the Defects ſpecially declared before were not ſufficient to make the Preſentee *& ſic Criminoſus*, as being not *Mala in ſe*, but *prohibita* by particular Laws under certain Penalties. Nay, the Argument they would make from the general Word *Criminoſus*, will not hold in the Caſe in Queſtion; but is clearly diſtinguiſhable from it: Becauſe one ſingle Act, one Crime ſpecially ſet forth, would diſable the Man. But in this Caſe Ignorance, that works a Diſability, muſt not be of any one particular Thing whatſoever; but

but a general Defect of Knowledge. And another Reaſon againſt their Inference from theſe and the like Caſes, is this, they belong to a different *Examen*, and upon that they require (as was ſaid before) a different Pleading.

Speccot's Caſe of Schiſm anſwered.

The great Caſe, and the only one that can be pretended to come near this, is *Speccot's* Caſe, mentioned in every contemporary Report of that Age, as a new Caſe. And a new one it is; and the Reaſons of it are differently reported in divers Books. And in Truth, the Reaſons of the Judgment do not warrant it, nor make it applicable to the Caſe at Bar.

The Authority of it is Queſtionable: For they agree, Schiſm or Hereſy, which the Judges there take to be all one, a Cauſe of Refuſal; and others ſaid, they did not know what was *Schiſmaticus inveteratus*: But they did not conſider that the Archbiſhop might, tho' they did not. But perhaps the Ordinary may judge that to be Schiſm which is not; and therefore the Temporal Courts are to judge what is Schiſm. And in the inforcing of this Caſe below, they ſaid the Ordinary is Judge only of Matters of Fact, not if the Fact be Schiſm; which is ſomewhat ſtrange.

The Reports of that Caſe are 5 *Rep.* 57. 1 *Anderſon* 189, 190. *Gold.* 36 and 52. and 3 *Leon.* 198, 199 and 300. in that Caſe the Biſhop pleaded, that the Preſentee was *Schiſmaticus inveteratus, & ideo non habilis*: Upon the Validity of this Plea there were divers Arguments; two of the Judges, ſays my Lord *Anderſon*, were for the Plaintiff, and two for the Defendant; and for the Deciſion of the Matter, the Opinion of the other was asked, and by the greater Opinion Judgment was given *pro Quer'*.

Then were repeated my Lord *Anderſon's* Words, *fol.* 189. the Inſtances that were urged were, ſays he, *Criminoſus & Perjurus*, but they are Matters triable both by Law Spiritual and Temporal; and the *Coment*, or how, is neceſſary to be ſhewn to determine the Trial: But *Schiſmaticus* in the principal Cauſe ſhall be tried only by the Spiritual Court, and not by the Temporal, as that of an Heretick may be generally pleaded. And divers Caſes were put to prove General Pleas and Iſſues triable at Common Law, and yet ſays he Judged *pro Quer'*.

This is my Lord *Anderſon's* Opinion of that Caſe; and whether the Antient Authorities vouched in that Caſe, do warrant that Judgment muſt be ſubmitted.

Authority of Precedents how to be eſtimated.

Beſides, by our Law, 'tis not any one Opinion, tho' judicially delivered, that can make or alter the Law. Nay, it doth not oblige any further than the Reaſon of it is conſiderable, and agrees with the Conſtitution and Rules of Law. My Lord *Vaughan* always declared in Favour of Reaſon and Authority; and that in Honour of our Law: For the contrary is to ſay, 'tis founded upon no Reaſon. This Judgment was when the Courts below were in Struggle with the Eccleſiaſtical; and the then High Commiſſion Courts Erected by 1 *Eliz.* had given ſome Provocation; which, with frequent Prohibitions, gave Occaſions to the Diſputes between the Biſhops and the Judges, in the be-

ginning of the Reign of K. *Jac.* 1. But admitting the Caſe to be Law, the ſame is eaſily diſtinguiſhable from this, and founded upon different Reaſons which cannot govern or influence this.

'Twas urged firſt in that Caſe there was ſome Poſſibility for the Biſhop to have ſet out the Hereſy certainly and particularly; for all Hereſy muſt be founded upon ſome particular Tenet, that is Repugnant to the common received and Orthodox Doctrine: Now in this Caſe, ſay they, the Hereſy ought to be Aſſigned, that the Party may Traverſe it, and purge himſelf, and the Archbiſhop not to be inveighled and obliged to run over all the Species of Hereſy; which, ſay they, may be almoſt impoſſible: But may have only one particular Opinion to Examine, whether the Preſentee did obſtinately maintain it. For if the Temporal Court had been of Opinion that ſuch Tenet in particular was not Hereſy, tho' the Ordinary thought it ſo, yet then they would have over-ruled the Plea, and not have wrote to the Archbiſhop at all. This is the ſole Cauſe of that Judgment: And then the Conſequence will be as was obſerved before. But their own Reaſon fails in this Caſe; for here the Sufficiency of Learning is Traverſable: For as hath been ſhewn it hath often been Traverſed; and as to the *ea ratione inhabilis*, no Objection can be to that; for the old Authorities Cited do warrant, nay, require it; and all Pleas of Special *Non eſt fact'*, as by breaking of a Seal, and the like, are in the ſame Manner.

Then beſides, the very Words of the Law of *Articuli Cleri* are very much worthy of Conſideration; it impowers the Biſhop to refuſe a Clerk *propter defectum ſcientiæ & alias Cauſas rationabiles*: Now all theſe Cauſes of Refuſal, mentioned in their Caſes, come under the *cauſas Rationabiles*, and *cauſa vaga & incerta eſt non Rationabilis*: Now want of Learning is not included by Intendment, but by expreſs Words, and therefore need not otherwiſe be ſet forth. I take it for granted, that as they would have it, the Temporal Judges are to Judge what is a reaſonable Cauſe of Refuſal; yet they are not to Judge, if Defect of Learning be a Cauſe or not: For in that the Statute is poſitive. Then if ſaid to be deficient in Learning, *& ea ratione inhabilis*, they had nothing to Judge upon: They were only to write to the Archbiſhop to know if the Fact were true? If he were deficient? And therefore it need not be ſet forth any otherwiſe, than as the Statute expreſſes it. Tho' in that Caſe, they ſay, there are divers Sorts of Schiſms and Hereſies in Doctrines on which the Biſhop might warrant his Refuſal: Yet 'tis not ſo much as once pretended there are any Opinions delivered in thoſe Caſes, that Deficiency of Learning is ſubject to the ſame Rules of Pleading.

Then the Plea is in the Negative, as was ſhewed before, which is more than enough to make a good Difference: And Negatives in a Bar are always allowed to be more general becauſe moſt favoured; and eſpecially here, where the Matter and Perſon, to which the Words are applied, do ſufficiently reſtrain and determine the ſeeming Uncertainty of it.

Canons as to Sufficiency of Preſentee.

Nothing can be pretended to reduce this to a greater Certainty but the Canons or the Statute of 13 *El. cap.* 12. or other Laws of the ſame Nature, 1 Canons of King *Jac.* 1. made in 1602. and they were made purſuant to Canons made 1562. by which no Man was to be admitted, *niſi rationem fidei juxta Articulos Religionis in Synodo Epiſcoporum & Cleri Anno* 1562. *approbatos Latine reddere, & eandem Scripturæ teſtimonio Corroborare poſſit; Can.* 3. 4. *Conditiones in ordinandis requiſit'*; this is merely a Negative Injunction on the Biſhop never to confer Orders upon any Man that cannot do this. It is not Mandatory upon him to ordain every Man that can do this; nor does it any way leſſen or diminiſh the Authority or Judgment of the Ordinary in Examination of the Fitneſs and Learning requiſite.

And Stat. 13 *El.*

So is the Statute of 13 *El.* the ſame induces an Incapacity on thoſe that ſhall not ſubſcribe the Articles: But it leaves all Things elſe to the Eccleſiaſtical Law. Neither the Canon nor the Statute are Derogatory from the old Eccleſiaſtical Law. They both leave it *in Statu quo* to the Eccleſiaſtical Judges. No Man will pretend that theſe are a Repeal of the Statute of *Articuli Cleri:* So that the Law remained as it did with more Latitude indeed to the Biſhop, but not with more Favour to the Clerk.

Objection as to Notice anſwered.

They objected, that here was not convenient Notice to the Patron, and the uſual Pleading of it is the ſame Day.

But ſurely that's well enough; and ſo was it held by all the Judges that favoured their Side in this Caſe: And 'tis apparent, that he had above four Months Time to have preſented another. Beſides, the Judges declared below, that if not a convenient Time, it ought to have come on their Side. But they admit Notice by their Replication, and inſiſt upon his Orders as an Eſtoppel to ſay that he was Illiterate.

They pretend, That he is ſtill under the Biſhop's Juriſdiction, and that he may deprive him for the ſame Cauſe, if ſufficient, after Inſtitution: But that's a great Miſtake. For there may be a Cauſe of Refuſal, which is not of Deprivation: For he may become Learned that was not ſo. And beſides, the Rule is falſe: After Induction, they would then be diſcourſing about Freehold, *&c.* A Man may be refuſed, becauſe *Non compos*, but he cannot be deprived for that Cauſe, though the Biſhop may provide a Curate, *&c.*

As to the Pretence of ſix Months Notice from the Time of the Refuſal, 'twas never inſiſted on at the Bar in *C. B.* or *B. R.* and the Judge who doubted did only ſay, he was not fully ſatisfied with the current Opinion of the Books. His Doubt aroſe upon this, That the Cauſe of Refuſal was not within the Patron's Knowledge. Suppoſe the Man had not Epiſcopal Orders, but pretended to them, and the Patron knew nothing of the Matter, ſhould this Preſentation prevent Lapſe? And the reſt were all of another Opinion. And the Books are full to this Effect: For, the Patron ought to preſent a Man qualified; otherwiſe 'tis as no Preſentation; and then Lapſe in Courſe. Suppoſe he had preſented a

mere *laicus*, 'tis as none. Suppoſe he had preſented a Woman as *idonea perſona*, 'tis as none. And theſe Inſtances may ſeem Trivial, but our Books do mention them.

2 *Roll's Abridg.* 364. *Kelway* 49, 59. 34 *Hen.* 7. 21. 14 *Hen.* 7. 21. and *Dyer* 227. and Sir *Symon Degge's* Parſon's Counſellor.

Upon the whole, the Queſtion is, whether a Court of Law ſhall Repeal the Statute of *Articuli Cleri?* Whether the Plea ſhall be adjudged ill, which is in the very Words of that Statute; when the ſame Fact was never pleaded otherwiſe? Nay, when it hath been pleaded thus oftentimes, and never excepted againſt till now?

Wherefore it was prayed that the Judgment might be reverſed.

Argument for the Defendant in Error.

On the other Side 'twas argued, That the Biſhop's Plea below was too General, and the Plaintiff's Replication good. That his being ordained a Prieſt, and a Licenſed Preacher, is enough. That this is an Anſwer to the Allegation of the *Minus Literatus*; his being a Prieſt is a kind of Superſedeas to his Examination. That there was no Learning requiſite to his having a Cure of Souls, which was not antecedently neceſſary to his receiving of Orders. That he ought not to be admitted into Orders, unleſs he be aſſured of or named to ſome Curacy: All which, ſuppoſes the Qualifications requiſite for a Benefice with Cure of Souls. Then it was urged, that here was not Notice ſufficient: For 'tis not till many Days after the Refuſal. For this might have put *Hele* the Patron beyond the Poſſibility of making a new Preſentation: And in all Pleadings of this Sort, the Notice is generally alledged to be the ſame Day, or within a Day or two at the moſt; That certainly it ought to be with convenient Notice. But then it was urged, That the ſix Months ought not to be from the Death of the laſt Incumbent. If there be a Perſon Criminal preſented, which the Patron doth or may know, as well as the Biſhop, there the ſix Months muſt be from the Death; but if it be upon a Refuſal for a Cauſe which lies only in the Biſhop's Knowledge, then it muſt be only from the Notice; and that Notice ought to be Perſonal: But if the Months incur from the Death, the Notice ſhould be in convenient Time; and what that is, the Court muſt Judge.

Then it was urged from *Specot's* Caſe, That this Plea is too general and uncertain. That a Temporal Right being concerned, the Biſhop ought to have ſet forth more particularly and diſtinctly the Cauſe of his Refuſal, 8 *Rep.* 68. the certain Cauſe of a Divorce muſt be ſhewn. 11 *Hen.* 7. 27. 2 *Leon.* 169. The Ordinary is a Judge only of the Matter of Fact, if True: Not if this Matter pretended be a Cauſe of Refuſal. He ought to alledge that ſo particularly, as to manifeſt it to the Court, in which the Suit depends, that 'tis a legal Cauſe of Refuſal. He

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Reaſons for Certainty in Pleading.

is not a Judge, whether *Hodder*'s Inſufficiency in any one Point of Learning be a good Cauſe of Refuſal: For, if it ſhould be ſo, the Temporal Right of Patronage would be very precarious. The Court ought to have enough before them, whereon to Judge of the Cauſe, as well as that on Iſſue may be joined and tried. Here 'tis only ſaid, that he is leſs ſufficient, not that he is altogether Illiterate. This will put it in the Power of the Ordinary to refuſe for want of Knowledge in any Learning as he thinks fit, as Mathematicks or Anatomy, without which a Man may be well Qualified to be a Rector of a Benefice: And the Conſequence of ſuch Opinion will be much to the Prejudice of Lay Patrons. That Certainty in Pleading ought to be encouraged, for the Prevention of the Exerciſe of Arbitrary diſcretionary Power. That the Wiſdom of the Common Law is to reduce Things to ſingle Queſtions, that the Determination upon them may be plain and certain, and known, and the Reaſons of ſuch Determinations may appear: Which cannot well be done, if general Allegations or Pleadings be countenanced. For which, and other Reaſons urged by the Counſel, who argued with the Judgment, 'twas prayed that the Judgment might be affirmed.

Reply for Plaintiff in Error.

It was replied, on Behalf of the Plaintiff in the Writ of Error, that the Books were very plain, that the ſix Months were to incur from the Death of the Incumbent: And then, if there were not Notice in convenient and due Time, in order to enable the Patron to preſent again, that this ought to come on the other Side.

That to require Learning in Preſentees to Benefices, would promote the Honour of the Church; nay, of the Nation in general. That every Man who knew this Preſentee and his Ignorance, even as to the *Latin* Tongue, muſt acknowledge, that the Reverend Prelate who refuſed him, had done worthily and becoming the Character of his Order, Family and Perſon. And therefore 'twas prayed that the Judgment ſhould be reverſed; and it was reverſed.

Judgment reverſed.

Robert Davis verſus *Dr. John Speed.*

Uſes upon a Fine of the Wife's Lands to the Heirs of the Husband, he dying before the Wife. Salk. 675. 4 Mod. 153. Skin. 351. The Caſe upon a ſpecial Verdict.

WRIT of Error on a Judgment in Ejectment in the *King's Bench*, for certain Lands in *Hampſhire*. The Declaration was upon the Demiſe of *Francis Cockey*: The Verdict finds, that *William Horne* and *Anne* his Wife were ſeized of the Lands in Queſtion in their Demeſne as of Fee, in Right of the Wife; that they made and executed a Deed, Covenanting to Levy a Fine thereof, to the Uſe of the Heirs of the ſaid *William Horne*, lawfully begot-

ten and to be begotten on the Body of the ſaid *Anne* his Wife; and for Default of ſuch Iſſue, then to the Uſe of the right Heirs of the ſaid *William Horne* for ever; and a Fine was levied accordingly to theſe Uſes; that *William* and *Anne* were ſeiſed *prout lex poſtulat*; that they had Iſſue *William Horne* their Son, who died without Iſſue in the Life of *William* and *Anne*; that ſhe died; and *William* the Father and Husband ſurvived her; that then he died without Iſſue; that the Leſſor of the Plaintiff is Siſter and Heir of the ſaid *William Horne*; that after his Death ſhe entred, and was ſeiſed *prout Lex poſtulat*; that *Elizabeth*, *Johanna* and others, were Co-heirs of the ſaid *Anne*; that their Eſtate and Intereſt came by mean Conveyances to the Defendant *Speed*; that he was ſeiſed *prout Lex poſtulat*; that the Leſſor of the Plaintiff entred, and Ouſted the ſaid *Speed*, and made the Demiſe in the Declaration; and that the Plaintiff entered and was poſſeſſed, till the Defendant entered upon him, and Ouſted him: And if it ſhall appear to the Court, that the Defendant's Entry was Lawful, they find the Defendant not Guilty: And if, *&c.* Upon this ſpecial Verdict, Judgment was given in *B. R.* for the Defendant.

Argument for Plaintiff in Error.

And now it was argued on the Behalf of the Plaintiff in the Writ of Error, that this Judgment was Erroneous, and ought to be Reverſed: For that theſe Lands belonged to the Heirs of the Husband by Force of this Deed and Fine. That this was in the Caſe of an Uſe, which was to be conſtrued as much according to the Intent of the Parties as a Will. That if by any Conſtruction that Intent could be fulfilled, it ought. That the Intent of the Parties here was plain to give this Eſtate to the Husband and his Heirs; that Uſes are to be governed by Equity, and that therefore the Meaning of the Perſons concerned was to be purſued. That the Woman intended to take Nothing herſelf; nor to reſerve any Thing, but to part with the Whole. That here was an Uſe by Implication in the Husband; tho' none could reſult back to the Husband, becauſe he had none before: But that in this Caſe, as in that of a Will, an Uſe might by Implication very well be raiſed to the Husband; and then this might be good by way of Remainder after the Death of her Husband; or create an Eſtate-Tail in him by coupling the Uſe implied to him for Life with that to the Heirs of his Body: And that if it were not ſo, then that it was good as a ſpringing contingent Uſe to the Heirs of the Body of the Husband, *&c.* and that in the mean Time till that Contingency happened, the ſame was to the Uſe of the Wife and her Heirs: And that this Conſtruction contradicted no Rule of Law. That it was no more than was allowed in Caſe of a Will, by way of Executory Deviſe, according to *Pell* and *Brown*'s Caſe in 2 *Cro.* that the Eſtate ſhould remain in the Wife and her Heirs, during the Life of the Husband. That this was never deſigned to take effect as an Uſe to be veſted immediately: And it was no more than if the Deed had declared the Uſe to be

after the Expiration of twenty Years, or at other future Time, to the Heirs of the Body of *William Horne*; and for Default of ſuch Iſſue, to his right Heirs; and that ſuch Time had happened; the Uſe would have veſted in the Heirs of his Body, or in his right Heirs, if he had died before that Time. That 'tis true, there muſt be a Perſon capable of taking at the Time when the Contingency happens: And ſo there was here, at the Time of his Death. That it could never be intended that the Heirs ſhould take immediately; for that then there was no ſuch Perſon in being, there could be no Heirs during his Life. That this was like the Caſe of *Webb* and Sir *Cæſar Cranmer*, where the Truſt of the Eſtate, during the Life of the Duke of *Southampton*, was adjudged to remain in the Heirs of the Deviſor; the Duke himſelf not being capable to take it. That here being no Perſon able to take under this Deed and Fine during the Husband's Life, it ſhall be conſtrued to remain as it was before, till that Life ends; and then the Uſe ought to take effect: For, otherwiſe, both the Deed and Fine are to no Purpoſe, they are all in vain; and the Intent of the Parties to it is defeated. And there were cited the Lord *Paget*'s Caſe in 1 *Anderſon*, and *Woodlett* and *Denny*, 2 *Crook* 439, and 1 *Leon.* 256.

A Perſon capable when the Contingency happens.

On the other Side it was argued with the Judgment, that this Deed and Fine can raiſe no Uſe to the Heirs of the Husband according to the Rules of Law. It was inſiſted, That if Husband and Wife do levy a Fine of the Wife's Land, and no Uſes are declared, or ſuch Uſes are declared, as are void and can never take effect; ſuch Fine is to the Uſe of the Wife and her Heirs: That in ſuch Caſe the Eſtate remains as it was; or if the Fine operates any Thing, it ſhall be for the Benefit of the Party to whom it did belong before.

Argument for Defendant in Error.

Then it was urged, That this was deſigned to raiſe an Uſe immediately to the Heirs of the, *&c.* and that there was no Perſon capable of taking at the Time of levying this Fine: The common Maxim in the Law proving it, *quod nemo eſt hæres Viventis.* That the Name and Nature of an Heir import a Succeſſor after Death; that this being deſigned to raiſe an Uſe *ex præſenti*, and no Perſon being capable of taking at that Time, the ſame muſt be void. That this is the Caſe of a Deed executed in the Life-time of the Parties: And not a Will, where large Allowances are often made in Favour of ſuppoſed Intentions, by Reaſon that Perſons are often ſurpriſed by Sickneſs, and preſumed to want the Aſſiſtance of Counſel; but the Rules of Law are always allowed to govern in Conſtruction of Deeds. Then it was urged, that nothing was ever deſigned to the Husband himſelf by this. That no Words in the Deed can favour ſuch a Preſumption. That this muſt either work as an Eſtate in preſent, or by way of Remainder: If the latter, then by the known Rules of Law, there muſt be a particular Eſtate to ſupport it; and ſuch particular Eſtate muſt be either expreſſed or implied. Here is none expreſſed: And if implied, it

muſt be in the Wife: And if in her; then ſhe dying before the Husband, her particular Eſtate did determine before the Remainder could take Place; and conſequently by all the Rules of Law it can never take place. And no particular Eſtate can be implied, in or for the Husband: For that there is nothing ſaid ſhewing ſuch Intent, and if the Conſtruction of Law be to prevail, then, as was urged before, that is in Favour of the Wife. But here it was plainly deſigned to take effect immediately, and therefore void; becauſe there was no Perſon in Being capable of taking at the Time the Eſtate was intended to veſt: And no Uſes are to be executed by the Statute, which are limited againſt the Rules of the Common Law, *Chudleigh*'s Caſe, 1 *Rep.* 129. if the Limitation of an Uſe be at this Day to *A.* for Years, and afterwards to the Uſe of the Heirs or Wife of *B.* which ſhall be, this is void: Becauſe 'twould have been void, if limited, in Poſſeſſion, *Dyer* 190. the Earl of *Bedford*'s Caſe in *Popham*, 3, 4. and 82. reſolved in like Manner to be void: Becauſe 'twould have been ſo in an Eſtate conveyed at Common Law. And all that can be objected is, that then this is all void, which is no more than may be pretended upon every imperfect Conveyance: But here the Caſe is in a Court of Law, and the Defendant is a Purchaſer who hath been thirty Years in Poſſeſſion, tho' that doth not appear in the Caſe.

And it was ſaid, That as to the Notion of a ſpringing contingent Uſe, 'tis hardly intelligible in it ſelf; and by no Means applicable to this Caſe: Becauſe here are no Words in this Deed, that carry any Relation to a future Time or Contingency. And the Objection is only this, That the Conveyancer was miſtaken in his Judgment; or that the Parties knew not what they meant; or that they meant to create ſuch an Eſtate, and in ſuch a Manner, as the Law will not allow: And neither of theſe are Reaſons ſufficient to prevail for the Reverſing of a Judgment given according to the Rules of Law, by which Men's Inheritances have all along been governed, and upon which many Eſtates do now depend.

'Twas further urged, That the contrary Opinion, which muſt be advanced to annul this Judgment, would render the Law and Men's Conveyances as doubtful and uncertain as laſt Wills and Teſtaments; and ſubmit Men's Titles to the Arbitrary Power and Will of thoſe that ſhall Judge of them. It is to impower them to ſuppoſe Intentions where not expreſſed, and to raiſe Uſes by Implication, where they were never deſigned: And in ſhort, 'twill deſtroy all the Difference between good and bad Conveyances; and enable Men to limit Uſes and raiſe Eſtates contrary to, and in different Manner from what the Law hath hitherto allowed. It will render Purchaſes more uncertain than they are at preſent; and that's more than enough already. And the Conſequence muſt be to produce a Confuſion in Property, *&c.* wherefore, upon the whole, it was prayed, That the Judgment might be affirmed. And it was affirmed accordingly. Judgment affirmed.

Watts

Watts & al' verſus *Crooke.*

Diſtribution to the half Blood of the Inteſtate's Eſtate. 2 Vent. 317. 1 Vernon 404. 2 Vernon 124.

APPEAL from a Decree in *Chancery:* The Caſe in ſhort was this; That *Peter Crooke* and *Elizabeth* his Wife, who was Siſter of the half Blood to *George Watts*, claimed to have an equal Share with *John Watts* and *Elizabeth Camfield*, who were Brother and Siſter of the whole Blood to the Deceaſed, of his Perſonal Eſtate; and a Decree was made in *Chancery* in Favour of *Crooke* and his Wife.

Argument for Appellants.

Reaſon of Diſtribution.

The whole Blood more favourable.

It was argued on Behalf of the Appellants, That the half Blood ought to have but a half Share. That in the Caſe of Inheritances the whole Blood was preferred. And that, tho' ſuch Rule could not govern intirely in this Caſe, yet it ſhewed which ought to have the Preference. That the true Reaſon of Diſtribution was this, The Law was to give in like Manner, as he might reaſonably be ſuppoſed willing to have given his Eſtate, in Caſe he had made a Will, and had not been ſurpriſed by a ſudden Death; that every Man was ſuppoſed to favour his next of Kin; that the Statute of Diſtributions did the ſame Thing; and then that the whole Blood wasnearer of Kin, becauſe he did partake of both the Stocks from whence he came; that the Relation or Kindred in this Caſe intirely came from the Parents; that this was not an Alliance by his own Contract, as Marriage, or the like; that the Inclination was ſuppoſed to ariſe to them from the Natural Love he bore to the Common Anceſtors; that ſuch Inclination could never be ſuppoſed equal, where the Party was only of the half Blood. And much to this Effect; and many Arguments drawn from the Civil Law were urged in Favour of the Appellant, and ſeveral Precedents cited, where it had been judged ſince the Statute for the half Blood to have but a half Share, by Sir *Richard Lloyd.*

Argument for the Reſpondents. Half Blood as near a Kin, and of equal Degree.

Precedents.

On the other Side it was argued, That the half Blood is as near a Kin to the Inteſtate, as the whole Blood, and ought to have an equal Share of the Perſonal Eſtate with the whole Blood; that the Party muſt be preſumed equally inclined to each Parent; that the Brother of the half Blood was as much a Brother as one of the whole; that the whole Blood was preferable in Deſcents, but that was only upon account of a Maxim in the Law; whereas here they are equally of Kin; the whole Blood is no more a Brother than the half; in the ſame Relation there can be no Difference or Degree; it might as well be pretended to have a Difference allowed upon the account of Seniority; that Opinions and Practiſe had been with the Decrees; that this hath been taken to be the Law in *Weſtminſt. Hall.* Before the Statute, 'twas held that a Siſter of the half Blood is in equal Degree with the whole, *Brown* verſus *Wood*, *Allen's Rep.* 36.

and ſo cited in *Smith's* Caſe. *Mod. Rep.* 209. So in the Caſe of *Milborne* and *Milborne*, 30 *March* 1671. before the Lord Keeper *Bridgman*. *W. M.* had by Will deviſed all his Lands in Truſt to pay every Brother and Siſter he had living 40 *l. per Annum* each, and he had ſeveral Brothers and Siſters, both of the half and whole Blood; the Brothers of the whole Blood did oppoſe the Payment of the 40 *l. per Annum* to thoſe of the half Blood; but it was adjudged and decreed, that they are equally intitled to the 40 *l. per Annum* apiece, and enjoyed accordingly. *Farmer* verſus *Lane* and *Naſh* in *Chancery*, 26 *Octob.* 1677. declared and adjudged by the Lord Chancellor *Nottingham*, That the half Blood are in equal Degree of Kindred with the whole Blood, and ought to have an equal Share of the Perſonal Eſtate. The like was in the Caſe of *Stapleton* and the Lord *Merion* againſt the Lord *Sherrard* and his Lady, in *Chancery* by Judge *Windham*, 13 *June* 1683. the Caſe was thus: *Robert Stapleton* had a Siſter of the whole Blood, and a Brother and Siſter of the half Blood, and died Inteſtate: Adminiſtration was granted to his Wife the Lady *Sherrard*, who claimed a Moiety of the perſonal Eſtate by the Cuſtom of the Province of *York*, and a Quarter of the other Moiety by Force of the Act for Diſtribution of Inteſtates Eſtates; and adjudged that the Wife ſhould have only one Moiety, and the other Moiety to be divided equally between the Brothers and Siſters both of the whole and half Blood. This Cauſe was Reheard the ſeventh of *May* 1685. by the Lord *Guilford*, upon the Certificate of his Grace the Lord Archbiſhop, to whom it was referred to certify the Cuſtom of the Province of *York*; who certified that the Wife ſhall have only a Moiety, and the other Moiety ſhall be divided amongſt the next of Kindred, and adjudged that the half Blood ſhall have an equal Share with the whole, and ſo the former Decree was confirmed.

2 Mod. 204. 2 Lev. 173. 1 Vent. 307. 2 Vent. 317. Jon. 93.

2 Chan. Rep. 255. Vern. 305, 314, 432, 465.

The ſame was adjudged by Mr. Juſtice *Charlton*, *June* 30. 1685. in the Caſe of *Pullen* and his Wife againſt *Serjeant*, in the Court of *Chancery*.

2 Chan. Rep. 300.

The like was, amongſt other Things, declared and decreed by the Lord *Jeffryes*, *Febr.* 19. 1686. in the Caſe of the late Lord *Winchelſea* againſt *Norcliff* and *Wentworth*; upon which Hearing were preſent and aſſiſting the then Lord Chief Baron *Atkyns*, and Mr. Juſtice *Lutwich*; and ſo was it *Nov.* 20. 1689. between *Stephens* and *Throgmorton* in *Chancery*.

It hath likewiſe been held ſo in the Eccleſiaſtical Court; and accordingly adjudged by Sir *Richard Raynes* upon ſolemn Argument, by the moſt eminent Counſel, both of the Civil and Common Law, in the Caſe of *James Storey*, *Febr.* 26. 1685. and in the Caſe of *George Hawles*, by the ſame Judge, upon *Jan.* 1. 1687.

Then it was urged, That the Statute of *Jac.* 2. for Reviving and Continuance of ſeveral Acts of Parliament therein mentioned, proves this: For 'tis enacted, *That if after the Death of the Father, any of his Children ſhall die inteſtate without Wife or Chil-*

dren in the Life-time of the Mother, every Brother and Siſter, and the Repreſentatives of them, ſhall have an equal Share; and that a Brother of the half Blood is a Brother to the Inteſtate as well as a Brother of the whole Blood, and therefore ought to have Share, and an equal Share with the Reſt. And upon Conſideration of all thoſe Precedents, and there being no Practiſe againſt it, except that of Sir *Richard Lloyd's*, it was prayed that the Decree might be confirmed; and it was confirmed.

Decree confirmed.

Lee Warner verſus *William North.*

Charitable Uſes. Delegates. 2 Vern. 118.

APPEAL from a Decree of the Lord Chancellor, which over-ruled the Exceptions taken by the Appellant, to a Decree made by Commiſſioners for Charitable Uſes, concerning a Gift by Biſhop *Warner's* Will; and the ſame was received, and the Parties ordered to anſwer. And each Side being heard by their Counſel, the Decree was affirmed. *Vide* the Statutes concerning Charitable Uſes and the Delegates; and *Quære* how they differ; and whether an Appeal doth not lie upon a Sentence by Delegates, as well as on a Decree of *Chancery* upon a Decree of Commiſſioners for Charitable Uſes?

Briggs verſus *Clerke.*

Error in Parliament from Judgment in Exchequer-Chamber.

WRIT of Error on a Judgment in *B. R.* affirmed in the *Exchequer-Chamber*, upon a Verdict in Debt for the Eſcape of one *Cook*; and none appearing for the Plaintiff in the Writ of Error, the Judgment was affirmed with the Increaſe of Forty Pounds in Coſts.

Vide the Caſe of *Elliſon* and *Warner*, *Mich.* 18 *Car.* 2. *B. R.* 2 *Keble* 91. Whether a Writ of Error lies in Parliament after Judgment affirmed in the *Exchequer-Chamber*? Or if that proceeding in the *Exchequer-Chamber* doth not come in lieu of Error in Parliament, according to the Statute of *Eliz.*

William Bridgman & al' verſus *Rowland Holt & al.*

A Writ of Error and Petition in Parliament. The Caſe below was thus: *William Bridgman* brings an Aſſize for the Office of chief Clerk for inrolling of Pleas in the Court of *King's Bench*; and the Plaintiff declares that the Office of chief Clerk for inrolling of Pleas in the Court of *King's Bench*, was Time out of Mind granted and grantable by the Kings and Queens of this Realm; and that King *Charles* the Second, by Letters Patent under the Great Seal of *England*, Dated the Second of *June* in the five and twentieth Year of his Reign, (after a Recital that *Robert Henley* and *Samuel Wightwick* were duly admitted to this Office for their Lives) granted this Office (upon the Petition of *Eliott*) to *Silas Titus*, ſo ſoon as it ſhould become void; and that *Wightwick* was dead, and *Titus* had ſurrendred his Patent, did, in Conſideration of Service done by the Earl of *Arlington*, grant this Office to the Plaintiff and his Heirs, for the Lives of the Earl of *Arlington*, Duke of *Grafton* and Ducheſs of *Grafton*, and the longer Liver of them, from and after the Death, Forfeiture or Surrender of Sir *Robert Henley*, and that Sir *Robert Henley* was dead, and that thereupon the Plaintiff became ſeiſed, and was ſeiſed of the Office till the Defendants did diſſeiſe him, *&c.*

Aſſiſe of *Novel Diſſeiſin.* Office of Chief Clerk for inrolling Pleas in B. R. by whom to be granted. The Caſe.

The Defendants pleaded that they did not wrong or diſſeiſe the Plaintiff.

Upon the Trial of this General Iſſue at the Bar of the *King's Bench* before the three puiſne Judges (the Chief Juſtice then ſitting near the Defendant's Counſel upon a Chair uncovered) the Plaintiff gave in Evidence the Letters Patent of 2 *June* 25 *Car.* 2. Then it was propoſed by the Counſel for the Defendant, That they would prove their Allegation, that the Office was anciently granted by the Kings and Queens of *England*, as was declared; but no Evidence was given beſides this Patent of *Car.* 2.

Prodeedings below in B. R.

Then the Counſel for the Defendant, waving the juſt Exception which they might have taken to the Plaintiff's Grant as to him and his Heirs (which ought not to be of ſuch an Office, for that by that Means it might come to an Infant) inſiſted upon the mere Right of Granting the ſaid Office, *viz.* that it was not grantable by the Crown, but was an Office belonging to the Chief Juſtice of the *King's Bench*, and grantable by him.

Then

Then to prove this, it was ſhewn, That this Officer is to inroll Pleas between Party and Party only, and had nothing to do with any Pleas of the Crown or Criminal Matters; that all the Rolls and Records in this Office were in the Cuſtody of the Chief Juſtice; that all the Writs to certify or remove the Records in this Clerk's Office, are directed to the Chief Juſtice; and from the Nature of the Imployment, 'twas inſiſted, that in Truth he was but the Chief Juſtice's Clerk; and that conſequently the ſame muſt be granted by the Chief Juſtice.

Evidence by Precedents for the Defendant in Error.

And for further Proof, it was ſhewn by the Records of the Court, that for the Space of two hundred thirty-five Years paſt, this Office when void had been granted by the Chief Juſtice, and enjoy'd accordingly under ſuch Grants. In *Trin.* 36 *H.* 6. *Rot.* 36. *inter placita Reg. Anno Dom.* 1458. It is inrolled thus, *Be it remembred, that the Tenth of* July *this Term, in the Court of our Lord the King at* Weſtminſter, *came* William Sond, *chief Clerk of our Lord the King for inrolling Pleas, before the King himſelf, in his proper Perſon; and in the ſame Court, of his Free-will, did ſurrender his ſaid Office into the Hands of Sir* John Forteſcue, *Kt. Chief Juſtice of that Court, (to whom of Right it doth belong to grant that Office to whomſoever he pleaſeth, whenſoever that Office ſhall be void, during the Time that the ſaid Sir* John Forteſcue *ſhall be Chief Juſtice) and that Office doth reſign and relinquiſh to the Uſe of* William Brome; *and the ſaid Chief Juſtice doth accept the ſaid Surrender, and doth the ſame Day grant the ſaid Office to the ſaid* William Brome, *who is preſently admitted into the ſaid Office for his Life, and ſworn accordingly.*

Mich. 1 *E.* 4. *Rot.* 51. Upon *Brome*'s Surrender to Sir *John Markham* then Chief Juſtice, the Chief Juſtice grants it to Mr. *Sonde*, who is admitted for Life, and ſworn.

Mich. 8 *E.* 4. *Rot.* 26. 1467. Upon the Surrender of *William Sonde* to the ſaid Sir. *John Markham* then Chief Juſtice, he grants it to *Reginald Sonde*, who is admitted and ſworn.

Reginald Sonde injoyed this Office till the Time of *Henry* the Seventh, and then *Bray* came in, and was Clerk till the 13 *H.* 7. and then came in *Roper.*

Hill. 9 *H.* 8. *Rot.* 3. *Anno* 1518. Upon the Surrender of this Place to Sir *John Fineux* Chief Juſtice, by *John Roper*, the Chief Juſtice grants the Office to Sir *John Roper* and *William Roper*, who are admitted for their Lives and ſworn.

Hill. 1 *&* 2 *E.* 6. *Anno* 1547. Upon the Surrender of *William Roper* (Sir *John* being then dead) to Sir *Richard Liſter* then Chief Juſtice, he grants the Office to *William Roper* and *Rute Heywood*, and they are admitted and ſworn.

Hill. 15 *El.* 1573. Upon the Surrender of *William Roper* (*Heywood* being dead) to Sir *Robert Catlin* then Chief Juſtice, he granted this Office to *John Roper* and *Thomas Roper* for their Lives, and they are admitted and ſworn.

Mich. 14 *Jac.* 1. *Rot.* 2. *Anno* 1616. Upon the Surrender of *John Roper* (*Thomas* being dead) to Sir *Henry Montague* then Chief Juſtice, he grants the Office to *Robert Heath* and *Robert Shute* for their Lives, who are admitted and ſworn thereupon.

Hill. 18 *Jac.* 1. 1620. *Shute* being dead, upon Sir *Robert Heath*'s Surrender to Sir *James Leigh* then Chief Juſtice, he grants the Office to Sir *Robert Heath* and *George Paul* for their Lives, and they are ſworn and admitted in Court.

Mich. 5 *Car.* 1. Upon the Surrender of Sir *Robert Heath* and Sir *George Paul* to Sir *Nicholas Hide* then Chief Juſtice, he grants it to *Robert Henley* and *Samuel Wightwick* for their Lives, and they are admitted and ſwore.

Trin. 1654. Upon *Wightwick*'s Surrender to *H. Roll* then Chief Juſtice (*Henley* being then under Sequeſtration) the Chief Juſtice grants it to *Sam. Wightwick* and to *Robert Henley* Junior for their Lives, and they are admitted and ſworn.

Mich. 12 *Car.* 2. Upon the Surrender of *Samuel Wightwick* and *Robert Henley* to Sir *Robert Foſter* then Chief Juſtice, he grants it to *Henley* and *Wightwick* for their Lives, and they are ſworn. *Wightwick* died ſoon after, and Sir *Robert Henley* enjoy'd it under that Grant 32 Years.

And it was obſerved on Behalf of the Defendant, That in all theſe Records produced and read in Court, after the Mention of the Surrender to the Chief Juſtice, there are theſe Words, *To whom of Right it doth belong to grant that Office whenſoever it ſhall be void.*

The Clerk of the Crown in the King's Bench, and his Office and Duty.

The Prothonotary there, and his Office.

It was then further inſiſted on and proved, That there are, in the Nature of Clerks, three conſiderable Officers of the Court of *King*'s *Bench*: The firſt and chiefeſt is the Clerk of the Crown, called ſometimes *Coronator & Attornat' Domini Regis, &c.* his Buſineſs is to draw all Indictments, Informations, *&c.* in Pleas of the Crown. This Officer being the chief Clerk in Court, is always made by Patent under the Great Seal. The ſecond Officer is this, the Prothonotary or chief Clerk for inrolling Pleas between Party and Party in Civil Matters: He and his Under-Clerks do inroll all Declarations, Pleadings, *&c.* in Civil Cauſes, eſpecially where the Proceedings are by Bill. This Clerk files in his Office all Bills, Declarations, *&c.* and all the Writs of this Court in Civil Matters, are made by him and his Under-Clerks, and teſted by the Chief Juſtice. And he hath the Cuſtody of all Returns of *Elegits*, *Executions*, *Scire Facias's*, and the filing of all Bills; every of which are, in the Eye and Judgment of the Law, in the Hands of the Chief Juſtice, whoſe Clerk this Officer is.

The Cuſtos Brevium.

The third is the *Cuſtos Brevium*, who keeps all the Rolls and Records of Judgments in this Court; which are alſo ſaid to be in the Cuſtody of the Chief Juſtice: And this Office, when void, is in his Gift and Diſpoſal.

It was further ſhewn on the Behalf of the Defendants, That in the Statute of *E.* 6. againſt the Sale of Offices, there is a *Salvo* to the two Chief Juſtices and Judges of Aſſize, to diſpoſe of the Offices in their Diſpoſition, as they uſed formerly. And ever ſince that Statute, theſe two Offices of chief Clerk to inroll the Pleas, *&c.* and the *Cuſtos Brevium*, have without Controul been diſpoſed by the Chief Juſtice of the Court of *King*'s *Bench*. And it is alſo obſerved, That in the Grant of this Office to Mr. *Bridgman* the Plaintiff, it is recited that *Henley* and *Wightwick* were *debito modo* admitted to this Office, and yet they never had any Grant from the Crown, nor any other Grant, except that from the Chief Juſtice before mentioned.

Then to prove the Defendant's Title to the Office, the Grant of the now Chief Juſtice to them for their Lives, was produced, and read, and proved, and that they were admitted and ſworn.

Evidence below for Plaintiff in Error.

To anſwer all this Evidence, there was produced the Copy of an Act of Parliament which was made in 15 *E.* 3. to this Effect: *It is conſented, that if any of the Offices aforeſaid* (which are other great Offices mentioned in the Act) *or the Controller or chief Clerk in the* Common Bench *or* King's Bench, *by Death or other Caſe be ouſted of their Office, the King, with the Conſent of the great Men, &c. ſhall put another fit Perſon in ſuch Office.* From whence the Plaintiff's Counſel would have inferred, That the King had a Right to grant this Office; and that this Act was declaratory of ſuch his Right; and that all the Grants from the Chief Juſtices ever ſince that Act, were but Uſurpations on the Crown; and that no Uſage of granting it by the Chief Juſtices could prevail againſt the King's Right.

Reply below for Defendant in Error.

To this it was replied, That the Act was repealed, as did appear by the Record it ſelf, as well as by their own Copy produced. And for a further Anſwer, 'twas ſaid, That the Office in Queſtion was not the Office mentioned in that Act; for that Act mentions the chief Clerk of the *King*'s *Bench*, which is the Clerk of the Crown; and ſo called in the 2 *H.* 4. the *Statute againſt Extortion.* And he is in Reality the chief Clerk in that Court, and hath Precedency of this Officer both in Court and elſewhere. And that this Officer is not called chief Clerk in the *King*'s *Bench*, altho' he is the Chief for inrolling of Pleas Civil in that Court. And the conſtant Uſage explains the Meaning of that Act. And that the Officer called the *chief Clerk* was meant to be the Clerk of the Crown; for that that Office hath been always granted by Letters Patent, according to that Act: And the Office in Queſtion was never enjoyed one Day by Virtue of a Grant from the Crown.

The Defendants did further inſiſt, That it was a Scandalous Imputation upon all thoſe Chief Juſtices, who were Perſons of Probity and Virtue, and had clear Reputations, to ſurmiſe that they impoſed and uſurped upon the Crown, as they muſt all have done, if the Right of granting this Place be in the King: And

Sir *Robert Heath*, that was the King's Attorney, took a Grant of the Office in Queſtion from the Chief Juſtice; and upon his Admittance, the Right of the Chief Juſtice to grant it is affirmed upon Record.

Then all this Evidence on both Sides being given, and the ſame being ſtrong on the Defendants Behalf; the Court propoſed to the Plaintiff's Counſel to be Nonſuit: Which they would not; but prayed the Court to direct the Jury, ſome of them ſaying that they would take another Courſe. And then the Court did briefly ſum up the ſame, and particularly the Evidence of the Act 15 *E.* 3. and what was urged from it by the Plaintiff, and the Anſwers made thereto, and left the Matter to the Jury upon the whole. The Jury withdrew, and after ſome Time gave a Verdict for the Defendants.

Upon this Verdict, the Counſel for the Plaintiff prayed Leave to bring in a Bill of Exceptions; and produced in Court, and tendred to the three Judges to be ſealed, a Parchment Writing in Form of ſuch a Bill; in which, after a Recital of the Declaration and Iſſue in the Cauſe, 'tis alledged, That the Plaintiff's Counſel produced in Evidence the Grant of the Office to the Plaintiff; and that they ſhewed to the Court and Jury, that the Office is of the Grant of the Crown: And that to make out the Right of King *Charles* the Second to grant this Office to the Plaintiff, they gave in Evidence the 15 *E.* 3. which in the Bill is ſet out at large (and is in Subſtance as is before ſet forth.) And 'tis further alledged in the Bill, That the Juſtices refuſed to allow, admit and receive the Allegations and Matters given in Evidence as ſufficient to prove the Plaintiff's Title to this Office, by Reaſon whereof the Jury found, That the Defendant did not diſſeiſe the Plaintiff; and prays that the Juſtices would put their Seals to it, according to the Statute of *Weſtminſter* 2. *cap.* 31. Bill of Exceptions.

The Juſtices upon reading this Bill did refuſe to Seal it, Refuſed by the Court, and why.

1. Becauſe 'tis aſſerted therein, That the Plaintiff's Counſel did ſhew that this Office was of the Gift and Grant of the King, whenſoever it ſhould be void; whereas there was no ſuch Evidence to ſhew any ſuch Right in the King offered, or pretended to, beſides the Patent in Queſtion and the Act of *E.* 3.

2. That the Judges refuſed to allow, admit and receive the Allegations and Matters given in Evidence for the Plaintiff as ſufficient to maintain his Title; whereas they were given in Evidence and conſidered; and if it be meant as a ſufficient Evidence to controul and over-rule all other; that doth not belong to the Court in Trials to determine, unleſs referred to them upon Demurrer to Evidence, but is the proper Buſineſs of the Jury: And if the Party be aggrieved, the Remedy is an Attaint. Nor can it be pretended that the Defendant's Evidence was admitted to over-rule the Record

cord produced: Becauſe no Objection was made to the Defendants Evidence at the Trial; and the ſame was all given before the Record of 15 *E.* 3. was produced; and conſequently the Jury muſt conſider the Force of it; for Evidence on both Sides being given by the Law of *England*, the Deciſion of the Right belongs to the Jury; and the Act of *E.* 3. being repealed, 'tis no Matter of Law, but the moſt which could be made of it was, that it was Evidence, which muſt be left to the Jury, together with the Defendant's Evidence. But no Bill of Exception will lie in ſuch a Caſe by the Statute, when the Evidence given is admitted as Evidence, and left to a Jury; and where no Oppoſition was made to the Defendant's Evidence, as here in this Caſe: And therefore in this Caſe a Bill of Exception could not be warrantable, becauſe the Plaintiff's Evidence was not refuſed or over-ruled; nor was the Defendant's Evidence fit to be rejected, or ſo much as oppoſed by the Plaintiff. And as to the Allegations made by the Counſel, and not proved, thoſe never could be an Exception. And for theſe and other Reaſons the Judges refuſed to Seal their Bill.

Error in Parliament, and a Petition alledging the Record imperfect.

Upon this a Writ of Error is brought, and a Petition was exhibited to the Lords Spiritual and Temporal in Parliament Aſſembled, in the Name of the Lady *Iſabella* Ducheſs of *Grafton*, and *William Bridgman* her Truſtee, ſhewing that King *Charles* the Second granted the Office in Queſtion to *W. B.* for the Lives of *Henry* Earl of *Arlington*, *Henry* Duke of *Grafton*, and of the Petitioner the Lady *Iſabella*, in Truſt for the Duke, his Executors and Adminiſtrators, to commence after the Death of Sir *Robert Henly*; that upon the Death of Sir *Robert Henly*, the Petitioner by Virtue of the ſaid Grant was well intitled to the ſaid Office; but was interrupted in receiving the Profits by *Rowland Holt*, Eſq; Brother to the Lord Chief Juſtice *Holt*, and by *Edward Coleman*, Gent. who pretended to be admitted thereto by ſome Grant from the Chief Juſtice; that thereupon an Aſſize was brought for the ſaid Office, which came to Trial; and the Petitioners Counſel inſiſted upon an Act of Parliament, proving the King to have the Right of granting the ſaid Office, which the Judges would not admit to be ſufficient to prove the King's Right to grant the ſame. That the Petitioner's Counſel did thereupon pray the Benefit of a Bill therein to be allowed, and ſealed by the Judges according to Law. And the Petitioner's Counſel, relying upon the ſaid Act of Parliament as ſufficient Proof of the King's Right, duly tendred a Bill of Exceptions before Judgment in the Aſſize, which the Judges upon the Trial ſaid they would Seal, yet when tendred to them in Court before Judgment, would not Seal the ſame. Thereupon Judgment was entred againſt the Petitioner's Title in the Aſſize by Default of the Judges not allowing and ſealing the ſaid Bill, according to the Duty of their Office by Law; whereby they are hindred from making the Matter of the ſaid Bill Part of the Record of the ſaid Judgment now brought and depending before your Lordſhips, upon a Writ of Error in Parliament, for reverſing

the ſaid Judgment in the Aſſiſe; and ſo are precluded from having the full Benefit of the Law by the ſaid Writ of Error, to examine, reverſe and annul the ſaid Judgment: Wherefore the Petitioners prayed that their Lordſhips would be pleaſed to order the ſaid Judges, or ſome of them, to Seal the ſaid Bill of Exceptions, to the End the ſaid Caſe might (as by Law it ought) come intirely before their Lordſhips for Judgment, *&c.*

Upon reading this Petition, 'twas ordered that the Lord Chief Juſtice, and the reſt of the Judges of the Court of *King*'s *Bench*, ſhould have Copies of the Petition, and put in their Anſwer thereunto in Writing on . . . . next.

At the Day appointed, there was delivered an Anſwer in theſe or the like Words:

The Anſwer of William Dolben, William Gregory *and* Giles Eyre, *Knights, three of their Majeſties Juſtices aſſigned to hold Pleas in their Court of* King's Bench *at* Weſtminſter, *to the Petition of the moſt Noble* Iſabella *Ducheſs of* Grafton, *and* William Bridgman, *exhibited by them to your Lordſhips.*

The Anſwer of the three puiſne Judges of the King's Bench.

THESE Reſpondents, by Proteſtation, not owning or allowing any of the Matters of the Petition to be True, as they are therein alledged, and ſaving to themſelves the Benefit of all the ſeveral Statutes herein after mentioned, and all the Right they have, as Members of the Body of the Commons of *England*, to defend themſelves upon any Trial that may be brought againſt them, for any Thing done contrary to their Duty, as Judges, according to the due Courſe of the Common Law, (which Right they hold themſelves obliged to inſiſt upon, in Anſwer to the ſaid Petition) think themſelves bound to ſhew, and offer to your Lordſhips Conſideration,

That the Petition is a Complaint againſt them for refuſing to Seal a pretended Bill of Exceptions, contrary to a Statute in that Behalf, as the Petition pretends, without ſetting forth the Tenor of the ſaid Statute, or what that pretended Bill was; whereas that Statute is the Statute of *Weſtminſter* 2. *cap.* 31. and doth enact, That if any impleaded before any Juſtices, doth offer an Exception, and prays the Juſtices to allow the ſame, and they refuſe ſo to do, the Party offering the Exception, is thereby to write it, and prays the Juſtices to Seal it, which they, or one of them, are thereby enjoined to do: So that if the pretended Bill was duly tendred to theſe Reſpondents, and was ſuch as they were bound to Seal, theſe Reſpondents are anſwerable only for it by the Courſe of the Common Law, in an Action to be brought on that Statute, which ought to be tried by a Jury of Twelve honeſt and lawful Men of *England*, by the Courſe of the Common Law, and not in any other Manner.

And the Reſpondents further ſhew, and humbly offer to your Lordſhips Conſideration, That the Petition is a Complaint in the Nature of an Original Suit, charging thoſe Reſpondents with a Crime of a very high Nature; in acting contrary to the Duty of their Office, and ſo altogether improper for your Lordſhips Examination or Conſideration, not being any more triable by your Lordſhips than every Information or Action for Breach of any Statute Law is; all which Matters are by the Common Law, and Juſtice of the Land, of Common Right to be tried by a Jury.

And the Petition is wholly of a new Nature, and without any Example or Precedent, being to compel Judges, who are by the Law of the Land to act according to their own Judgments, without any Conſtraint or Compulſion whatſoever; and trenches upon all Mens Rights and Liberties, tending manifeſtly to deſtroy all Trials by Jury.

And it is further manifeſt, That this Complaint is utterly improper for your Lordſhips Examination, for that your Lordſhips cannot apply the proper and only Remedy which the Law hath given the Party in this Caſe, which is by awarding Damages to the Party injured (if any Injury be done) for theſe are only to be aſſeſſed by a Jury. And they, theſe Reſpondents, are ſo far from apprehending they have done any Wrong to the Petitioners in this Matter, that they humbly offer, with your Lordſhips Leave, to wave any Privilege they have as Aſſiſtants to this Honourable Houſe, and appear *Gratis* to any Suit that ſhall be brought againſt them in *Weſtminſter-hall*, touching the Matter complained of in the Petition.

And they further, with all Humility offer to your Lordſhips Conſideration, That as they are Judges, they are under the ſolemn Obligation of an Oath to do Juſtice (without reſpect of Perſons) and are to be ſuppoſed to have acted in this Matter with and under a due Regard to that ſacred Obligation: And therefore to impoſe any Thing contrary upon them, may endanger the Breaking of it, which they humbly believe your Lordſhips will be tender of.

And they further humbly ſhew to your Lordſhips, That by a Statute made in the 25th of *E.* 3. *cap.* 4. it is enacted, That from thenceforth none ſhall be taken by Petition or Suggeſtion to the King, or his Council, unleſs by Indictment or Preſentment of good and lawful People of the Neighbourhood, or by Proceſs by Writ Original at Common Law; and that none ſhall be put out of his Franchiſe or Freehold, but by the Courſe of the Common Law. And by another Statute in the 28th of *E.* 3. *cap.* 3. it is expreſly provided that no Man ſhall be put out of his Lands and Tenements, nor impriſoned or diſinherited but by due Proceſs of Law. And by another Statute made in the 42 *E.* 3. *cap.* 3. it is enacted, That no Man ſhall be put to anſwer without Preſentment before Juſtices, or Matter of Record on due Proceſs and Original Writ, according to the old Law of the Land.

And the Reſpondents further ſay, That inaſmuch as the Petition is a Complaint, in the Nature of an Original Cauſe for a ſuppoſed Breach of an Act of Parliament; which Breach (if any be) is only Examinable and Triable by the Courſe of the Common Law, and cannot be ſo in any other Manner; and is in the Example of it Dangerous to the Rights and Liberties of all Men, and tends to the Subverſion of all Trials by Juries, theſe Reſpondents conceive themſelves bound in Duty (with regard to their Offices, and in Conſcience to the Oaths they have taken) to crave the Benefit of defending themſelves touching the Matter complained of in the Petition, by the due and known Courſe of the Common Law; and to rely upon the aforeſaid Statutes, and the Common Right they have of Free-born People of *England*, in Bar of the Petitioners any further Proceeding upon the ſaid Petition, and humbly pray to be diſmiſſed from the ſame.

Then it was after Debate ordered, That Counſel be heard at the Bar of the Houſe on the ſaid Petition.

And afterwards upon the Day appointed for the Hearing of Counſel, it was inſiſted on, in the Behalf of the Petitioners, That here was a Right, and a Right proved, and no ways to come at it but this; that if a Bill of Exceptions be tendred and refuſed, this Houſe can command them to do it; that this Proceeding of the Judges is to ſtifle the Matter of Law; the Writ upon the Statute muſt be returnable here, and cannot be otherwiſe; that this follows the Judgment into Parliament; that this Houſe is to Judge of every Thing belonging to that Judgment; that if this cannot be done, there will be a Failure of Juſtice; that there have been Writs of Error upon Judgments, with the Bill of Exceptions annexed; that Damages to be recovered in an Action, gives no Reparation for the Office; that the Action muſt be brought before the Judges, and ſo it muſt be a Dance in a Circle; that as to the Judges Oaths, the Juſtices of Peace are upon their Oaths, and yet they may be committed; that this is not fit for a Jury to try, Whether the Judges have done well or ill in refuſing to Seal this Bill of Exceptions: This Refuſal is the Way to keep the Law within the Bounds or Walls of *Weſtminſter-hall*, and effectually to prevent its ever coming hither; that this was not a Complaint of the Judges; that as yet they would not accuſe them of a Crime, they only ſaid, *fac hoc & vive*; that the Court of *King*'s *Bench* below doth the ſame Thing to the Judges in *Ireland*; they command others, and ought to be commanded; that they themſelves ſend Mandatory Writs, as the Caſes are in *Yelvert'* and *Cro. Car.* That the Lords had directed the Judges in many Things; and ſo they did in *Jeffery Stanton*'s Caſe; that by Command under the Privy Seal Things have been done, which otherwiſe would not; and my Lord *Shaftsbury* was remanded to the *Tower* upon the Authority of that Caſe, 15 *E.* 3. the Statute ſays that the Peers ſhall Examine; for by great Men are meant the Peers.

Argument for the Petitioners *i.e.* the Plaintiffs in Error.

Then

Then were urged certain Caſes, where the Lords had commanded the *Chancery* to proceed ſpeedily, and to give Judgment, *&c.* Earl of *Radnor*'s Caſe; *Engleſield* and *Engleſield*, and other like Caſes were quoted; and from thence they argued the Power of the Lords to command the Judges to do the Thing deſired.

Argument againſt the Petition. Where a Bill of Exceptions is to be allowed.

'Twas argued on the other Side againſt the Petition to this Effect, That this was a Cauſe of great Conſequence, in reſpect of the Perſons concerned, as alſo of the ſubject Matter: It being the Complaint of a Noble Peereſs againſt three of the Judges, before whom ſhe was lately a Suitor; and concerning the Juriſdiction of this Houſe; that this Petition was the moſt Artificial which could be contrived to hinder the Juſtice of the Law, and to procure a Determination in Prejudice of two hundred thirty-five Years Enjoyment; that it is deſigned to get a Cauſe to be heard and adjudged on a Writ of Error by the Evidence on one Side only, or rather by that which was no Evidence at all, if the Copy produced at the Trial was true: For now upon the Return of what they deſire, nothing of the Defendant's Evidence would or could appear. When a Bill of Exceptions is formed upon the Statute, it ought to be upon ſome Point of Law, either in admitting or denying of Evidence, or a Challenge, or ſome Matter of Law ariſing upon Fact not denied, in which either Party is over-ruled by the Court. If ſuch Bill be tendred, and the Exceptions in it are truly ſtated, then the Judges ought to ſet their Seal in Teſtimony that ſuch Exceptions were taken at the Trial: But if the Bill contain Matters falſe or untruly ſtated, or Matters wherein they were not over-ruled, then they were not obliged to affix the Seal; for that would be to command them to atteſt a Falſity. A Bill is not to draw the whole Matter into Examination again: 'Tis only for a ſingle Point; and the Truth of it can never be doubted after the Bill is ſealed; for the adverſe Party is concluded from averring the Contrary, or ſupplying an Omiſſion in it.

This Bill was without Foundation; the Plaintiff was not over-ruled in any one Point of Law. 'Tis true, the Counſel deſired the Opinion of the Court after all the Defendant's Evidence had been heard, concerning their Record; and the Judges did declare, that they thought it did not extend to the Office in Queſtion, but to the Clerk of the Crown, who is the chief Clerk in Court, and hath Precedency. And the Grant of that Office by the King, both before and ſince that ſuppoſed Act, proves that to be meant, and not the Office in Queſtion, which hath always been granted by the Chief Juſtice; and this was afterwards left to the Jury. Here was no Cauſe for a Bill of Exceptions, the Judges, at the Counſels Deſire, gave their Opinion upon the Thing, but did not over-rule them; for that the Act being repealed could make no Point of Law, but only be Evidence for the Jury to conſider.

Beſides, this Act, tho' repealed, is inſerted in the Bill as an Act in Force; and if an Act be ſet out, and no Repeal appears, it muſt be underſtood to be in Force; and if the Bill had been ſealed, it muſt have been taken as in Force, and the Defendants could not here upon the Writ of Error have ſhewn the Repeal, which was in the 17 *E.* 3. and appeared ſo upon the Evidence; from whence 'twas inferred, That this Bill was too Artificial. If any Point of Law had ariſen upon the whole Evidence (and a particular Point there was none) the whole ought to have been inſerted in the Bill, or at leaſt all that which concerned that Matter.

If this ſhould be allowed, 'twould be in the Power of any Counſel to deſtroy any Verdict; as in Caſe of a Title by Deſcent from Father to Son, and a Will of the Father had been produced and proved at the Trial, and a Bill had been ſealed, only ſhewing the Seiſin and Deſcent, the Son muſt prevail, tho' he had no Title. This is enough to ſhew that the Judges are not obliged; nay, are obliged not to ſeal this Bill.

Then it was argued, That the preſent Complaint is beneath the Honour, and beſides the Juriſdiction of the Houſe of Peers; that this was a Complaint of a Default in the Judges, which cannot be tried in this Place; that *Magna Charta* was made for them as well as for others; that if they offend againſt any Rule of the Common Law, or particular Statute, whether in their Perſonal Behaviour, or as Judges, they are triable only by their Peers; that Peers are only ſuch *qui pari conditione & lege vivunt*; that the Crown and Conſtitution of *England* had ſo far exalted their Lordſhips in their State and Condition, that 'tis beneath them to judge or try Commoners; that all Powers and Privileges in this Kingdom, even the higheſt, are circumſcrib'd by the Law, and have their Limits: That this is a Complaint of a great Crime in the Judges, a Breach of their Oaths, and with the Inſinuation of Partiality to one of themſelves; which, if true, incurs Loſs of their Offices, and Forfeiture of their Eſtates by Fine, and of their Liberty by Impriſonment; and all this to the King; beſides Damages to the Party grieved; and therefore it concerns them to have the Benefit of the Law.

That this comes not regularly into the Houſe; 'tis not any Matter of Advice to the King, nor of Privilege, nor of Contempt to this Court, becauſe the Matter complained of was before any Judgment below, or any Juriſdiction could be attached here, by Pretence of the Writ of Error. 'Tis brought hither by way of Complaint for a ſuppoſed Miſcarriage in *Weſtminſter-hall*, in a private Cauſe between *Bridgman* and *Holt*, two Commoners: It preſumes the Lords to be proper Judges in the firſt Inſtance, for the hearing and puniſhing of all Offences committed by the Judges, and that in a Summary way upon a Petition, and without that due Proceſs of Law, which is eſtabliſhed under our Government.

Either this Refuſal is puniſhable, or not; If not, the Petition ought to be rejected: If it be, 'tis either by the Common Law, or by Act of Parliament; but neither do warrant this Practiſe of Petitioning. And the old Law is that, which paſt Ages have approved, and that by which Juſtice is to be adminiſtred; and whatſoever is done by way of Judgment in a different Manner than the Law allows, is againſt that Law.

The Proceeding in this Manner is againſt the Conſent of the Reſpondents, for they have pleaded to the Juriſdiction of this Houſe as to this Matter, *&c.* and therefore it differs from all Caſes, where the Parties concerned have anſwered the Complaint, and thereby ſubmitted the ſame to an Examination: And this will prevent the Force of many Precedents which may be cited on this Occaſion. Some Perſons perhaps have from a Confidence of Succeſs, or from a ſlaviſh Fear, or private Policy, forborn to Queſtion the Power of their Superiors; but the Judges muſt betray their Reputation and their Knowledge of the Laws, if they ſhould own a Juriſdiction, which former Times and their Predeceſſors were unacquainted with.

Objection of Failure of Juſtice anſwered.

'Tis neceſſary to anſwer the Pretence of a Failure of Juſtice, in caſe this Method be rejected; and therefore it muſt be obſerved, That our Law knows nothing of extraordinary Means to redreſs a Miſchief: But that upon a Defect of ordinary ones, Recourſe is to be had to the Legiſlature, and to that only; either to explain and correct in Reference to Things paſt, or to provide Remedies for the Future. But here is a common eaſy Means of Relief, if there had been Occaſion.

By the Statute of *Weſtminſter* 2. *cap.* 31. In caſe the Judge refuſes, then a Writ to Command him, which is to iſſue out of Chancery, *quod apponat ſigillum ſuum*; and then a Writ to own or deny his Seal.

By 2 *Inſt.* 426. the Party grieved by the Denial may have a Writ upon the Statute, Commanding the ſame to be done *juxta formam Statuti*, *Reg.* 182. *Fitz. Natura Brevium* 21. and 11 *H.* 4. 52, 65. there's the Form of the Writ ſet out at large. It recites a Surmiſe of an Exception taken and over-ruled, and it follows *vobis præcipimus, quod ſi ita eſt, tunc ſigilla veſtra apponatis. Si ita*, 'tis conditional, if the Bill be true and duly tendered, then this Writ; and if it be returned, *quod non ita eſt*, then an Action for a falſe Return, and thereupon the Surmiſe will be tried: And if found to be ſo, Damages: And upon ſuch a Recovery, a peremptory Writ Commanding the ſame: That the Law is thus, ſeems plain; tho' no Precedent can be ſhewn of ſuch a Writ, 'tis only for this Reaſon, becauſe no Judge did ever refuſe to Seal a Bill of Exceptions; and none was ever refuſed, becauſe none was ever tendred like to this, ſo Artificial and Groundleſs. But that ſuch Actions lie upon this Statute, were Cited *Regiſt.* 174. *Nat. Br.* 10. and they are called Attachments, and Damages ſhall be to the Party, and a Fine to the King. So it is in all Caſes of Statute Laws, which do either Prohibit or Command the

doing of a Thing for the Advantage of any Perſon, ſuch Perſon, if injured by a Diſobedience to that Law is intitled to an Action, tho' the Statute doth not in expreſs Words give one. 2 *Inſt.* 55. 74, 118, 131. and the ſame holds in judicial Proceedings, the Caſe of the *Marſhalſea*, 10 *Rep.* 75. 4 *E.* 4. 37. and the ſame Reaſon warrants the Action for a *Scandal' Magnat'*. But perhaps 'twill be ſaid, that tho' an Action lies for a Diſobedience to this Writ, yet the Writ not being returnable, no Action lies for a falſe Return; and conſequently no peremptory Writ; and by Conſequence there's no adequate Remedy in Caſe of an unjuſt Refuſal: But to this it may be anſwered, That the Writ being Conditional, 'tis a good Anſwer to it, that the Fact was not as is ſurmiſed; and that Return will juſtify the Refuſal. And certainly ſuch Return may be made; and if not, when the firſt Writ is proved to be true in all its Suggeſtions, by Judgment in an Action for not obeying it, the ſame Reaſon will warrant a Peremptory Writ: But whether this be thus, or not, it only argues an Imperfection in the Law, proper for the Notice of the Legiſlature, and will not juſtify the Method of Proceeding now attempted here in this Place.

It hath been Objected, That ſuch Proceedings are not like to be ſucceſsful, becauſe Judges ſtill are to try thoſe Matters: But theſe are Reflections not Arguments. And our Conſtitution is founded on a Notion, that Parity of Condition is the beſt Qualification of a Trier. And here muſt be a Jury to try the Fact, and they are ſubject to an Attaint, if their Verdict contradict the Evidence. And no Direction of a Judge can excuſe them: For if it be a Point of Law, they are not obliged to find a ſpecial Verdict, but may find a general one upon their own Peril of an Attaint. Then,

Either this is deſigned as a Criminal Proceeding againſt the Judges, in order to Puniſhment; or as a Civil Proceeding, to gain Damages to the Party: Or elſe neither one nor the other, but to have an Order Commanding the Thing to be done. Which if refuſed, then to have them compelled by Impriſonment, *quouſque*, *&c.* Neither of the firſt are pretended; and the laſt is not a Warrantable Method, when the Law hath preſcribed a Writ in Chancery, and that's not proſecuted.

Here cannot be tried the particular Requiſites to ground ſuch an Order as they deſire; as whether the Evidence or Exception as ſtated, was offered at the Trial? Or if offered, whether 'twas over-ruled? Nor whether the Matter offered were believed? For if not believed, it makes no Evidence, and ſo can raiſe no Point in Law. There can be no Jury impanelled to try this, nor can an Iſſue be directed hence for the Trial of it.

By this Means, the Judges loſe the Benefit of that legal Trial, by a Jury of their Peers, which is their Fence and Protection againſt Power, Art or Surprize; the beſt for Indifference and Diſcovery of Truth. The Inſtitution of the Law is cautious and wiſe in its Proviſion for both. Challenges are admitted below;

'tis

'tis Derogatory to the Honour of this Court, to ſuppoſe it neceſſary here; but to have it in *Weſtminſter-hall*, is however reckoned a Common Privilege and Birth-right. There the Law is determined by one, and the Fact is aſcertained by another: Here both are in the ſame Hands. Not that any Jealouſy can be ſuppoſed of Miſchief by it in this Houſe: But the Practice of it now may give Precedent to future Reigns and Ages, in which there may be Danger of a Partiality.

Below, there are by the Law appointed and provided particular Terms and Days for doing Juſtice; and they are certain; the Diſtances between them are known, according to the Nature of the Suit; which capacitates the Parties concerned, their Agents and Witneſſes, to be ready, and there can be no Surpriſe.

It muſt not be preſumed, That this Houſe may err; but if any Error be poſſible, 'tis impoſſible for the Judges to be relieved, for theſe Reaſons; in Reſpect of the Court, for no Addreſs can be made in ſuch Caſe, but to the ſame Perſons who did the Wrong; which is always with ſome Prejudice or Diſadvantage; becauſe the Party erring is to Judge, if he himſelf hath erred. Then the Proceedings here being in *Engliſh* and Summary, it cannot well be made appear, what was the Proof in the firſt Inſtance, no Record being kept thereof. Then ſuppoſe Evidence be allowed, which is none, the Perſon againſt whom the ſame is given, is Remedileſs; theſe Evils may happen in the repeating of this Practiſe in the next Reign, tho' they cannot in the preſent.

Then this Method is not only againſt the general Tenor and Frame of the Common Law, but againſt divers Acts of Parliament and Declarations of this Houſe.

Magna Charta, 9 *H.* 3. *cap.* 29. is expreſs, *per judicium parium vel per legem terræ*, now the latter only refers to ſuch Caſes which are not Triable *per jud' par'*: Beſides, to make it the *lex terræ*, there muſt be Ancient and continual Uſage; 22 *E.* 3. Numb. 30. ſhews that no new Practice can make a Law.

By 25 *E.* 3. *cap.* 4. 'tis enacted, That no Man ſhall be taken by Petition or Suggeſtion to the King, or to his Counſel, without Preſentment, or by Proceſs, or Writ Original at Common Law, and that none ſhall be put out of his Franchiſe or Freehold, but by due Courſe of Law before uſed. Here the one explains the other; by Writ or due Courſe of Law are taken for the ſame Thing, and both uſed in Contradiſtinction to Petition; the 28 *E.* 3. *cap.* 3. is the ſame.

Then the 42 *E.* 3. *cap.* 3. 'tis by due Proceſs and Original Writ according to the Old Law of the Land; the 1 *R.* 2. Numb. 87. *Cott.* 162. no Suit to be determined before the Lords or before the Counſel, but before the Juſtices only.

But the 4 *H.* 4. *cap.* 23. is fuller, it recites, That in Pleas as well Real as Perſonal in the King's Courts, the Parties be made to come upon grievous Pain, ſometimes before the King himſelf, ſometimes before the King's Council, ſometimes to the Parliament,

ment, to anſwer thereof anew, to the Grievance of the Parties, and in Subverſion of the Common Law of the Land, 'tis enacted, that after Judgment, the Parties ſhall be in Peace until the Judgment be undone by Attaint or Error; this is agreed and amplified 3 *Bulſt.* 47, 115.

Here is Mention even of the Parliament's ſummoning Perſons to anſwer, in Subverſion of the Laws.

There are other Statutes not Printed, as 4 *E.* 3. Numb. 6. *Cotton's Abridg.* 7. and the ſame in 2 *Inſt.* 50.

The Lords gave Judgment of Death without Indictment, upon ſome who were not their Peers, and agreed in full Parliament, that they ſhould be diſcharged of ſo doing for the Future, and that it ſhould not be drawn in Precedent, that the like ſhould not be done on any but their Peers; 'tis a Declaration of the Lords, nay, 'tis an Act of Parliament, and penned in the ſame Manner, as 29 *E.* 1. Statute *del Eſtoppel*, at a Parliament agreed, 33 *E.* 1. by common Accord, and 9 *E.* 2. the King in Parliament by Advice of his Council, and theſe are held to be Statutes.

This was not only an Acquittal from the Trouble, but a clear Denial of the Power, as appears by the Words before, that they had aſſumed to themſelves, and the Words ſubſequent, that the like ſhould not be done again. The Complaint was, becauſe it was Intermedling with Commoners after that Manner. Suppoſe this Houſe ſhould make an Order upon this Matter, which is a Law Buſineſs, and not of Equity, no Execution can be made of it but Commitment.

There is the 15 *E.* 3. now inſiſted on, Printed in the Old Statute Book, but omitted in this; 'tis in *Cotton* 28. 33. and 'tis thus: The Commons complained of Breaches of *Magna Charta*, *&c.* and pray Remedy; with this Concluſion, that every Man may ſtand to the Law according to his Condition; and the Lords pray, that *Magna Charta* may be obſerved; and further, that if any, of what Condition ſoever, ſhould break it, he ſhould be adjudged by the Peers of the Realm in Parliament, the next Parliament, and ſo from Parliament to Parliament, and it was enacted accordingly. This was ſpecious, the ſame being only for the Breakers of *Magna Charta*, but in 17 *E.* 3. that whole Parliament, *i. e.* all the Acts of it are repealed; which Repeal ſeems deſigned for the Petitioners, for it Repeals the ſuppoſed Laws which make both their Title and this Juriſdiction which they would ſupport. 'Tis obſervable what is ſaid in the Repeal, that the Act was contrary to the King's Oath, in Prejudice of his Crown and Royalty, and againſt the Ancient Law: And ſuch is this, for here is no Uſe of the King's Writ, no Addreſs to, or Command by the King for this Proceeding, nor any Mention of his Name in the Petition.

By 1 *H.* 4. *cap.* 14. Appeals in Parliament for Offences are declared againſt, as contrary to Reaſon and the Conſtitution; this is ſuch. This is not incident to the Power of Hearing and Determining upon the Writ of Error: Becauſe, as was ſaid before,

it belongs properly to the Chancery, to Iſſue a Writ Commanding it to be done, *Si ita eſt*, as is Suggeſted.

By 12 *Rep.* 63, the King himſelf cannot take any Cauſe out of the Court where it depends, and give Judgment on it himſelf.

And this Houſe can make no Order upon this Petition that will be a Record, as in *Hob.* 110. The Petition is in the Name of a Perſon not Party to the Record. Which ſeems very new: For 'tis by a Stranger, in the Eye of the Law, to the Cauſe, and conſequently ought not to be joined in any legal Proceeding, if this be ſuch.

This is not incident to the Juriſdiction of the Error; no more than Amendment of an Error in the Court from whence the Record comes, or the filing of Bail, a Declaration, or a Warrant of Attorney, or the Suing out another Proceſs in Defect of one loſt, or the like. Theſe Things are never Examinable in the ſuperior Court: For in theſe Collateral Things the other are intruſted.

Here's no Hardſhip upon the Petitioner: For he might have been Nonſuit, or have given this repeal'd Act in Evidence at firſt; and then have demurr'd on the Defendant's Evidence: Or might have ſued a Writ on the Statute of *Weſtminſter* 2.

But ſuppoſe this Houſe ſhould Examine this Matter, and find the Petition to be Groundleſs, will ſuch Determination prevent the Judges from being troubled by ſuing of the Writ afterwards. Suppoſe it *Econtra*, that this Houſe ſhall puniſh the Judges and commit them, and award Damages, or make other Order in Favour of the Petitioners, would ſuch Order bar or ſtop the legal Proceſs afterwards? Can any Order made here be uſed below, as a Recovery or Acquittal, as an *Auterfoits Convict*, or *Auterfoits Acquit*?

If there be any Thing in it, 'tis a Breach of a Statute Law; for which they are puniſhable at the King's Suit; will the Proceeding here ſave them from the Trouble of anſwering to an Indictment or Information for the ſame Thing?

Then ſince a Writ lies to Command them to Seal this Bill; and ſince an Act of Parliament directs it, if it were a true one, perhaps it may be Queſtionable, if they do not break their Oaths, in caſe they Sign it in Obedience to any other Direction. If they did it in Obedience to the Royal Word, Signet or Privy Seal of the King their Maſter, 'twould be a Breach of their Oath. Then as to Precedents of the Exerciſe of ſuch a Juriſdiction, none come near this: And Abundance of particular Caſes were put and anſwered; but the conſiderable one was *Jeffery Stanton*'s Caſe, 14 *E.* 3. 31. *Cot.* 30.

The Caſe is odd, 'tis in *Fitz. Abridg.* tit. *Voucher*, 119. there is a Writ Directory to the Judges to proceed to Judgment, or to bring the Record before the Parliament, that they might receive an Averment, &c. To this Caſe it was Anſwered, That the ſame was long before moſt of the Statutes aforementioned, and in full

Parliament: And in that Caſe *Stone* would not agree to it; but adhered to the Law according to his Opinion. 'Tis true, *Shard*, in the Abſence of *Stone*, gave Judgment according to that Advice; but a Writ of Error was afterwards brought in the *King*'s *Bench*, and the Judgment was reverſed, 15 *E.* 3. *B. R.* even contrary to the Advice of Parliament, to the other Judges.

As to the other Caſes of Property Examined here, either the Parties ſubmitted to anſwer; or they were at the Suit or Complaint of the Commons; or by Conſent of the King and Commons: But none of them carry any Reſemblance to this, where the Judges inſiſt upon it, that there is another and a proper Remedy. All the Caſes in *Ryley*'s *Placita Parliamentaria* are either Ordinances of Parliament, or Directions to follow before the Juſtices. But there's no Precedent to warrant this Petition, and therefore 'twas prayed, that the Petition might be diſmiſſed.

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And afterwards . . . . . .

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Dominus Rex verſus *Walcott.*

WRIT of Error to Reverſe a Reverſal in *B. R.* of an Attainder for Treaſon, before Commiſſioners, *&c.* at the *Old Baily*, againſt *Walcott*; the Record was thus: *Gulielmus Tertius, Dei Gratia* Angliæ, Scotiæ, Franciæ, & Hiberniæ *Rex, fidei Defenſor, &c. Dilect' & fideli noſtro* Joh'i Holt *Militi, Capitali juſticiario noſtro ad placita coram nobis tenend' aſſign' ſalutem. Quia in Recordo & Proceſſu, ac etiam in redditione Judicii cujuſdam Indictamenti verſus* Thomam Walcott *nuper de* London *Generoſum modo defunct', qui pro quibuſdam altis proditionibus perſonam Domini* Caroli *Secundi nuper Regis* Angliæ *tangent' modo indictat' fuit & ſuperinde per quand' Jur' ſuperinde int' præfat' nuper Regem & præfat'* Thomam Walcott *capt' coram Juſtic' dict' nuper Regis ad Gaolam Deliberand' aſſign' convict' exiſt', & Judicium ſuperinde reddit' fuit pro præfat' nuper Rege verſus præfat'* Thomam Walcott, *ut dicitur, quæ quidem Recordum & Proceſſum prædict' cauſa erroris intervenient' in Curia noſtra coram nobis venire fecimus, & Judicium inde in eadem curia noſtra coram nobis reverſatur; & quia in reverſatione Judicii prædict' coram nobis ſuper bre' de Error' prædict' Error intervenit manifeſtus, ad grave Dampnum cujuſdam* Iſabellæ Dillon *Viduæ Comitiſſæ Roſcomon, nuper* Uxoris Wentworth Dillon *armig' nuper Comitis Roſcomon in Regno noſtro* Hiberniæ, *ſicut ex querela ſua accepimus;*

Error from *B. R.* Salk. 632. 4 Mod. 395. The Sentence in Treaſon ought *inter al'* to contain that his Bowels be burnt, *he being yet alive.* The Record. The Writ of Error.

mus; *Nos Errorem ſiquis fuerit modo debito corrigi*, & eidem *Iſabellæ* plenam & celerem Juſticiam fieri, volentes in hac parte,

Vobis mandamus quod ſi Judicium ſuper Breve de Errore prædict' reverſat' ſit, tum Recordum & Proceſſum prædicta, cum omnibus ea tangent', nobis in Parliamentum noſtrum ad proximam Seſſionem viceſimo octavo die inſtantis Menſis Julii *tenend' diſtincte & aperte mittatis & hoc Breve, ut inſpect' Record' & Proceſſu prædictis, ulterius inde de aſſenſu Dominorum Spiritualium & Temporalium in eodem Parliamento exiſtent', pro Errore illo corrigend'* Fieri Fac' *quod de Jure & ſecundum Legem & conſuetudinem Regni noſtri* Angliæ *fuerit faciend'. Teſte* Thoma *Archiepiſcopo* Cantuar', *& cæteris Cuſtodibus & Juſticiariis Regni, apud* Weſtm' *ſexto die* Julii *Anno Regni noſtri octavo.*

Martin.

Reſponſ. *Johannis Holt* Mil', Capital' Juſticiarii infra nominat;

The Return *per proprias manus* of the C. J.

Record' & Proceſſ' unde infra fit mentio, cum omnibus ea tangen', Domino Regi infra nominat' in præſens Parliamentum propriis manibus protuli, in quodam Record' huic Brevi annex', prout interius mihi præcipitur.

J. Holt.

Placita in B. R.

Placita coram Domino Rege apud *Weſtm'* de Termino *Paſchæ* Anno Regni Domini *Willielmi* Tertii nunc Regis *Angliæ* &c. ſeptimo. Rot. 3.

London, ſſ. *Dominus Rex mandavit Juſtic' ſuis per Literas ſuas Patentes ſub magno Sigillo ad inquirend' per Sacr'um proborum & legalium hominum Civitat'* London, *ac aliis viis, modis & mediis quibus melius ſciverint aut poterint de quibuſcunque Prodition', Miſpriſion' Prodition', Inſurrection', Rebellion' & al' Malefactis, Offenſis & Injur' quibuſcunque, necnon Juſtic' ſuis ad Gaolam ſuam de* Newgate *pro Civitat'* London *de Priſon' in eadem exiſten' deliberand' aſſign' & eorum cuilibet Breve ſuum in hæc verba.*

Error to the Juſtices of Gaol-Delivery, &c. at *Newgate.*

Gulielmus *tertius, Dei gratia* Angliæ, Scotiæ, Franciæ & Hiberniæ *Rex, Fidei Defenſor*, &c. *Juſticiar' ſuis per Literas ſuas Patentes ſub magno Sigillo* Angliæ *confect', ad inquirend' per ſacr'um proborum & legalium hominum Civitat'* London, *ac aliis viis, modis & mediis quibus melius ſcierint aut poterint de quibuſcunque Prodition', Miſpriſion' Prodition', Inſurrection', Rebellion' & al' Malefactis, Offens' & Injur' quibuſcunque; necnon Juſtic' ſuis ad Gaolam ſuam de* Newgate *pro Civitat'* London *de Priſonariis in eadem exiſtent' deliberand' aſſign' & eorum cuilibet ſalutem. Quia in Recordo & Proceſſu ac etiam in redditione judicii cujuſdam Indictamenti verſus* Thomam Walcott *nuper de* London *Gen' defunctum pro quibuſdam altis prodition' perſon' Domini* Caroli *Secundi nuper Regis* Angliæ *tangent' unde indictat' eſt; & ſuperinde per quandam Jur' Patriæ inter præfat' Dominum nuper Regem & præfat'* Thomam Walcott *capt. coram Juſticiar' dicti Domini*

mini Caroli *Secundi nuper Regis* Angliæ, *&c. ad Gaolam prædict' deliberand' assign', convict' exist', & judic' superinde reddit' sit, ut dicitur Error intervenit manifestus, ad grave dampnum* Johannis Walcott *Gen', filii & hæred' prad'* Thomæ, *sicut ex querela sua accepimus: Nos Errorem, si quis fuerit, modo debito corrigi, & eidem* Johanni *plenam & celerem Justitiam fieri, volentes in hac parte, vobis Mandamus, quod si Judicium reddit' sit, tunc Record & Proces' prædict', cum omnibus ea tangent', nobis sub Sigillis vestris, vel un' vestrum, distincte & aperte mittat', & hoc Breve, ita quod ea habeamus a die* Paschæ *in tres septiman' ubicunque tum fuerimus in* Anglia, *ut inspect' Record' & Proces' prædict', ulterius inde, pro Errore illo corrigend', fieri faciamus quod de jure & secundum legem & consuetudinem Regni nostri* Angliæ *fuerit faciend'. Teste meipso apud* West', *decimo septimo die* Martii, *Anno Regni nostri septimo.*

Executio istius Brevis patet in Schedula & Recordo huic Brevi annex'.

The Return by the Lord Mayor of *London.*

Respons. Thomæ Lane *Mil' Major' Civitat'* London *ac un' Justic' infrascript'. Record' & Proces' unde in Brevi superdict' fuit mentio sequit' in hæc verba.*

London, ss. *Memorand', quod per quandam Inquisition' capt' pro Serenissimo Domino Rege, apud* Justice Hall in the Old Baily, London, *in Parochia Sancti* Sepulchri, *in Warda de* Faringdon *extra* London *prædict', die* Jovis, *scilicet duodecimo die* Julii, *Anno Regni Domini nostri* Caroli *Secundi, Dei gratia,* Angliæ, Scotiæ, Franciæ *&* Hiberniæ *Regis, Fidei Defensor, &c. tricesimo quinto, coram* Willielmo Prichard *Mil' Majore Civitat'* London, Francisco Pemberton *Mil' Capitali Justic' Domini Regis de Banco, &c. ac aliis Sociis suis, Justiciariis dicti Domini Regis, per Literas Patent' ipsius Domini Regis eisdem Justiciar' prænominat', & aliis, ac quibuscunque quatuor vel plur' eorum, sub magno Sigillo dict' Domini Regis* Angliæ *confect' ad inquirend' per sacrament' proborum & legalium hominum de Civ'* London, *ac aliis viis, modis & mediis quibus melius scierint aut poterint, tam infra libertat' quam extra, per quas rei veritas melius sciri poterit, & inquir' de quibuscunque Prodition', Misprision' Prodition', &c. infra Civitat' prædict', tam infra libertat' quam extra, per quoscunque, & qualitercunque, habit', fact', perpetrat' sive commiss', per quos vel per quæ cui vel quibus, quando, qualit' & quomodo, & de aliis articulis & circumstant' præmissa, & eorum aliquod, vel aliqua qualitercunque concernen' plenius veritat', & ad eadem, & al' præmissa audiend' & terminand' secundum legem & consuetudinem Regni dicti Domini Regis* Angliæ *assignat', per sacrament'* Rich' Alie *Arm' & aliorum proborum & legalium hominum Civitat'* London *præd', qui adtunc & ibidem Jurat' & onerat' existent', ad inquirend' pro dict' Domino Rege, pro Corpore Civitat' prædict' extitit præsentat', quod* Tho. Walcott *nuper de* London *Gen', ut falsus Proditor contra illustrissimum & excellentissimum Principem, Dominum nostrum* Carolum *Secund', Dei grat',* Angliæ, Scotiæ, Franciæ *&* Hiberniæ *Regem, & Naturalem Dominum suum, timorem Dei in Corde suo non habens, nec debit' Ligean' suam ponderan', sed instigatione Diabolica mot' & seduct', dilection' & veram, debitam & naturalem obedient', quas verus & fidelis subdit' dict'*

Domini Regis erga ipſum Dominum Regem gereret, & de Jure gerere tenetur, penitus ſubtrahens, & totis viribus ſuis intenden' pacem & communem tranquilitat' hujus Regni Angliæ *perturbare, & guerram & rebellion' contra dictum Dominum Regem ſuſcitare & movere, & gubernat' dicti Domini Regis in hoc Regno* Angliæ *ſubvertere, & dict' Dominum Regem a titulo, Honore & Regali nomine Coron' Imperial' Regni ſui* Angliæ *deponere & deprivare, & dictum Dominum Regem ad mortem & finalem deſtruction' adducere & ponere, ſecundo die* Martii *Anno Regni Domini* Caroli *Secundi nunc Regis* Angliæ, *&c. triceſimo quinto, & diverſis al' diebus & vicibus tam antea quam poſtea, apud Parochiam Sancti* Michaelis Baſſiſhaw *in Warda de* Baſſiſhaw London, *malitioſe & proditorie, cum diverſis aliis proditoribus Jur' præd' ignot', conſpiravit, compaſſavit, imaginat' fuit' & intendebat dictum Dominum Regem, ſupremum Dominum ſuum, non ſolum de Regali ſtatu, titulo, poteſtate & Regimine Regni ſui* Angliæ *deprivare & dejicere, verum etiam eundem Dominum Regem interficere & ad mortem adducere & ponere, & antiquam gubernat' hujus Regni* Angliæ *mutare, alterare & penitus ſubvertere, ac ſtragem miſerabilem inter ſubdit' dict' Domini Regis per totum Regnum ſuum* Angliæ *cauſare & procurare, ac inſurrection' & rebellion' contra dict' Dominum Regem movere & ſuſcitare infra hoc Regnum* Angliæ, *& ad eaſdem nefandiſſimas prodition' & proditorias compaſſation', imagination' & (propoſita ſua præd' perimplend' & perficiend', idem* Thomas Walcott, *ut falſus Proditor, tunc & ibid', & diverſis aliis diebus & vicibus tam antea quam poſtea, malitioſe, proditorie & adviſate ſe aſſemblabat, conveniebat & conſultabat cum præd' al' proditoribus Jur' prædict' ignot', & cum eiſdem tractabat de & pro eiſdem ſuis proditionibus & proditoriis compaſſation', imagination' & propoſitis ſuis proſequend', exequend' & perimplend', quodque idem* Tho. Walcott, *ut falſus proditor, malitioſe, proditorie & adviſate, tunc & ibidem, & diverſis al' diebus & vicibus tam antea quam poſtea, ſuper ſe aſſumebat, & prædict' aliis proditoribus promittebat ſe fore auxiliant' & aſſiſtent' in execution' prodition' & proditor' compaſſation', imagination' & propoſit' ſua' prædict' perimplend' & perficiend', & eaſdem nefandiſſimas prodition' & proditor' compaſſation', imagination' & propoſita ſua prædict' perimplend' & perficiend', idem* Tho. Walcott, *ut falſus proditor', malitioſe, proditorie & adviſate, tunc & ibidem, arma videlicet Anglice* Blunderbuſſes, *Bumbard', Anglice* Carbines, *Sclop', Anglice* Piſtols, *& procurabat & præparabat, contra Ligeantiæ ſuæ debit', contra pacem dicti Domini nunc, Coron' & Dignitat' ſuas, &c. necnon contra formam ſtatut' in hujuſmodi caſu edit' & proviſ. &c. per quod præcept' fuit vic' Civitat' prædict' quod non omitt', &c. quin caperent præfat'* Tho. Walcott, *ſi, &c. adreſpond. &c. & modo ſcilicet ad deliberation' Gaolæ dicti Domini Regis de* Newgate *tent' pro Civitat'* London, *apud* Juſtice Hall *prædict' in dicta Parochia Sancti* Sepulchri, *in Warda de* Faringdon *extra* London *prædict', dicto die* Jovis, *undecimo die* Julii *anno triceſimo quinto ſupradict', coram præfat'* Will. Pritchard' *Mil' Majore Civitat'* London *ac aliis Sociis ſuis Juſticiar' dict' Domini Regis ad Gaolam ſuam de* Newgate *de Priſon' in ea exiſten' deliberand'*

assign', præfat' Justic' dicti Domini Regis prius nominat' per manus suas proprias deliberaver' Indictament' prædict' hic in Cur' de Recordo in forma Juris terminand', &c. super quo ad istam eandem deliberation' Gaolæ dict' Domini Regis de Newgate *tent' pro Civitat' prædict' apud* Justice Hall *prædict' dicto die* Jovis *duodecimo die* Julii *anno tricesimo quinto supradict', coram præfat' Justic' ult' nominat' ven' præd'* Thomas Walcott *sub Custod'* Dudlei North *Mil' &* Petri Rich *Ar', Vicecom' Civitat' prædict' (in quorum Custod' ex causa prædicta præantea Commiss. fuit) ad Barram hic duct' in propria persona sua, qui committitur præfat' Vic' Civitat'* London, *&c. & statim de præmissis prædict' in Indictament' prædict' specificat' ei superius imposit' allocut' qualit' se vellet inde acquietari, Idem* Thomas Walcott *dicit, quod ipse non est inde culpabil', & inde de bono & malo pon' se super Patriam; Ideo immediate ven' inde Jur', &c. coram præfat' Justic' ult' nominat' hic, &c. & Jur' Jurat' illius per præfat' Vic' ad hoc impanellat', scil. &c. exact' vener', qui ad veritat' de præmiss. dicend' elect', triat' & jurat', dicunt super sacrament' suum quod prædictus* Tho. Walcott *est culpabilis de alt' prodition' prædict' in Indictament' prædict' specificat' ei superius imposit' modo & forma prout per Indictament' prædict' superius versus eum supponitur, & quod idem* Tho. Walcott *nulla habuit bona seu catalla, terras sive tenementa, ad eorum notic', & super hoc statim quæsit' est de præfat'* Tho. Walcott *si quid pro se habeat vel dicere sciat, quare Cur' dict' Domini Regis hic ad judicium & execution' de eo super veredict' prædict' procedere non debeat, qui nihil ulterius dicit præterquam ut prius dixerat, super quo visis & per Cur' hic plene intellectis omnibus & singulis præmissis, consider' at' est per Cur' hic quod præd'* Tho. Walcott *ducatur ad Gaolam dicti Domini Regis de* Newgate unde venit, *& ibidem super* Bigam *ponatur, & abinde usque ad furcas de* Tyburn *trahatur, & ibidem per Collum suspendatur, & vivens ad terram prosternatur, & quod secreta membra ejus amputentur, & interiora sua extra ventrem suum capiantur, & in ignem ponantur, & ibidem comburentur, & quod caput ejus amputetur, quodque corpus ejus in quat' partes dividatur, & ill' ponantur ubi Dominus Rex eas assignare voluit, &c. per quod præcept' fuit Vic' quod caperent eum, si, &c. ad satisfaciend', &c. & modo, scil. die* Jovis *prox' post mensem* Paschæ *isto eodem Termino, coram Domino Rege nunc apud* Westm', *ven' quid'm* Johan. Walcott, *filius & hæres prædict'* Tho. Walcott *defunct', de alta prodition prædict' convict' & attinct', per* Benedict' Browne *Attornat' suum, & habit' audit' Record' prædict' super quo præd'* Thomas *convict' & attinct' existit, dicit quod in Record' & Proces. prædict', ac etiam in redditione Judicii prædict', manifeste est Errat', in hoc* viz. *quod apparet per Record' prædict', quod Judicium reddit' est pro dicto Domino nuper Rege, ubi per leges hujus Regni* Angliæ *Judicium prædict' pro dicto* Tho. Walcott *reddi debuisset, & in eo manifeste est errat'; erratum est etiam in hoc,* viz. *quod Crimina in & per Indictamentum prædict' versus prædict'* Thom' *imposit' per Leges hujus Regni* Angliæ *incerte, dubie, & nimis generalit' allegat' existunt, quodque idem Indictamentum supposuit & eidem* Thomæ *onerat & imponit crimina diversimoda, & toto genere inter se discrepantia, Quodque Judicium superinde reddit', sit, & existit contrarium*

Legibus

Legibus Angliæ, *& minime pronunciand', vel imponend' pro, vel ſuper hujuſmodi Crimina qual' in Indictament' prædict' ſupponuntur, & in eo manifeſte eſt Errat': Unde Pet' Judicium Cur' hic in præmiſſ', & quod Judic' & Attinctur' prædict', ob Error' prædict' & al' in Recordo & Proceſſ' prædict' compert' exiſtent', reverſetur, adnulletur, & penitus pro nullo habeatur, & quod ipſe prædict'* Johan. Walcott, *filius & hæres prædict'* Thomæ, *ad omnia quæ ipſe præd'* Johannes *occaſione Judicii & Attinctur' prædict' amiſit reſtituatur, & quod Cur' hic procedat ad examinationem tam Record' & Proceſſ' prædict', quam materias ſuperius pro Errore aſſign', &c. & quia Cur' dicti Domini Regis hic de Judicio ſuo de & ſuper premiſſis reddend' nondum adviſatur, dies inde dat' eſt præfat'* Johanni Walcot *in ſtatu quo nunc, &c. in Cr'o Sanctæ Trinitat' coram Domino Rege ubicunque, &c. de Judicio ſuo inde audiend', &c. ad quod quidem Cr'm Sanctæ Trinitat' coram Domino Rege apud* Weſtm', *ven' prædictus* Johan. Walcott *per Attornat' ſuum prædict', & ut prius Petit Judicium, & quod Judicium & Attinctur' prædict' verſus prædict'* Tho. Walcott *reddit', ob Error' prædict' & al' in Recordo & Proceſſ' prædict' compert' & exiſten', reverſetur, adnulletur & penitus pro nullo habeatur, & quod ipſe prædict'* Johan. Walcott, *filius & hæres prædict'* Thomæ, *ad omnia quæ ipſe idem* Johannes *occaſione Judicii & Attinctur' prædict' amiſit reſtituatur, & quod Cur' hic procedat ad examination' tam Record' & Proceſſ' prædict' quam Materiarum ſuperius pro Errore aſſign', &c.* And after many Continuances, it is entred thus: *Super quo Viſ. & per Cur' hic intellectis omnibus & ſingulis præmiſſis, diligenterque examinat' Record' & Proceſſ' prædict', & Err' per prædict'* Johan. Walcott *ſuperius aſſign', & al' in Record' & Proceſſ' prædict' compert', exiſten, Maturaque deliberatione inde prius habita, conſiderat' eſt, quod Judicium prædict', ob Error' prædict', & al' in Record' & Proceſſ' prædict' compert' exiſten', revocetur, adnulletur & penitus pro nullo habeatur, & quod prædict'* Johan. Walcott, *filius & hæres prædicti* Tho. Walcott, *ad omnia quæ ipſe occaſione Judicii & Attinctur' prædict' amiſit reſtituatur, & quod prædict'* Johan. Walcott *eat inde ſine die, &c. Et ſuper hoc* Johan. Trevor *Miles, Attorn' Domini Regis nunc General', qui pro eodem Domino Rege in hac parte ſequitur, coram Rege ac Proceribus hujus Regni* Angliæ, *hoc prædicto Parliamento, apud* Weſtm' *in Com'* Middleſex *aſſemblat', in propria perſona ſua ven', & dicit quod in Record' & Proceſſ' ac etiam in redditione Judicii ſuper prædict' priori Brevi dicti Domini Regis de Errore corrigend' per prædict'* Johan. Walcott *proſecut' pro revocatione & adnullatione Judicii prædict' verſus prædict'* Tho. Walcott *ſuper Indictamentum prædict', pro alta proditione prædict' reddit', manifeſte eſt Erratum in hoc,* viz. *quod ubi per Recordum prædict' ſupponitur, quod prædict'* Johan. Walcott *poſuit loco ſuo quendam* Benedict' Browne *Attornat' ſuum ad proſequend' prædict' primum Breve de Errore in & ſuper Indictament' prædict' pro alta proditione prædict', quod tamen* Benedict' Browne *nullum habuit Warrant' Attorn' pro eodem* Johanne Walcott *de Recordo affilat', ideo in eo manifeſte eſt Errat'; Errat' eſt etiam in hoc,* viz. *quod Record' prædict' apparet quod Judicium prædict' pro revocatione & adnullatione Judicii prædict' verſus*

prædict' Thomam Walcott, *in forma prædict' reddit', redditum fuit pro prædict'* Johanne Walcott *verſus dict' Dominum Regem, ubi per Legem terræ hujus Regni* Angliæ *Judicium ill' reddi debuiſſet pro Dicto Domino Rege verſus eundem* Johannem; *Ideo in eo manifeſte eſt Errat'; & hoc parat' eſt verificare; unde pet' Judicium, & quod Judic' ill' ob Error' prædict', & al' in Record' & Proceſſ' prædict' exiſten', revocetur, adnulletur, & penitus pro nullo habeatur, & quod dictus Dominus Rex ad omnia, quæ ipſe occaſione revocation' & adnullation' Judicii prædict' amiſit, reſtituatur, &c.*

Argument for King. No Warrant of Attorney filed by the Heir's Attorney below.

It was argued on Behalf of the King, that there was no Warrant of Attorney filed, and conſequently the Reverſal was not regular, for Default of an Appearance by the Heir, who proſecuted the Writ of Error; and that there was no Day given to the Attorney General; nor was the Attorney General, or the Patentee, a Party to the Record; nor any Plea or Anſwer made by either of them to the Aſſignment of the Errors.

Anſwered.

To this it was anſwered, That by the Common Practiſe in the *Crown Office*, no Warrants of Attorney are filed, neither for Defendants upon Indictments, nor for Plaintiffs in the Writ of Error; that it had not been known, within the Memory of any Man living, that ſuch Warrants were ever filed: That there need no Day be given to the King, or the Attorney General, for that the King's Attorney was ſuppoſed always preſent in Court, and the King cannot be Nonſuited, becauſe he cannot be called. That there never was any Anſwer to the Aſſignment of Errors in ſuch Caſes; that in Capital Caſes there needs no joining of Iſſue upon pleading *Not guilty.*

Argued that the want of *ipſo vivente* in the Judgment a frivolous Objection. Precedents.

Then it was argued, That there was no Error to warrant the Reverſal to the Attainder; that the Exception taken to the Judgment was trivial and frivolous; that *ipſo vivente* was not of Neceſſity to be inſerted; that never any Judge was known to require that the Man's Bowels ſhould be burnt while he was alive; that the ſame was impoſſible to be executed; that the Law never appointed any Judgment for Treaſon, as eſſential, beſides Drawing and Hanging; and that Quartering has been ſo long uſed, as to be accounted Part of the Judgment, yet 'tis not neceſſary to make a good Judgment; and if that be ſo, no more is needful than Drawing, Hanging and Quattering; that ancient Precedents were thus ſhort; *Rot' Parliament'* 3 *H.* 5. *p.* 1. *n.* 6. *Thomas de Gray & al'* had been attainted of Treaſon upon a ſpecial Commiſſion at *Southampton*, and the Record of the Attainder removed into Parliament, 3 *H.* 5. and the Judgment was good, *Thomas de Gray ut proditor Domini Regis & Regni ſui* Angliæ *diſtrahatur, ſuſpendatur & decapitetur*: And in the Records *Penes Theſ. & Camar' Scacc'*, 3 H. 7. f. 10. a. 'tis *detrahatur & ſuſpendatur.* And many other there are in that Place to the ſame Effect, and in the ſame Manner, *Glanvil. lib.* 3. *cap.* 13. *& Fleta cap.* 16. And there is the Caſe of *David* Prince of *Wales*, who was Drawn, Hang'd,

Beheaded, Diſmembred and Burnt, *Britt. de Treaſon, cap.* 8. *p.* 16. Drawing and Death is the Puniſhment of Treaſon, *& des Appeles, c.* 22. *p.* 43. to the ſame Effect; *& Lib. Aſſiſ.* 30 *E.* 3. *pl.* 19. and Abundance of Records were cited as found in the *Exchequer*, and nothing mentioned in them but *detrahatur & ſuſpend'*. And then was cited *Rot. Parl.* 2 *H.* 6. *n.* 18. and the Book 1 *H.* 6. 5. 19 *H.* 6. 103. and 1 *H.* 7. 24. *Bro. Coron.* 129. there is a Judgment againſt *Humfry Stafford per omnes Juſticiar'* Angliæ, *quod iterum ducatur turri & abinde ponatur ſuper herdillum, & trahatur per* London *ad* Tyburn, *ibidem ſuſpendatur, & ante mortem corda ſcindantur, & caput ſcindatur, & Corpus ejus dividatur in quatuor partes, & mittentur ad voluntatem Domini Regis.* Earl of *Eſſex*'s Caſe, *Moore*'s *Rep.* and *Owen*'s Caſe in 1 *Roll*'s *Rep.* have not this inſerted. And *Stamford*, who was a Judge in 1 *& 2 Ph. & M.* ſays *c.* 19. *p.* 128. only *en ſon view*: And *Alexander Burnett*, who was convicted of Treaſon for taking *Romiſh* Orders at the *Old Baily*, 26 *Car.* 2. *Rot.* 56. had no ſuch Judgment; *Corcker*'s Caſe for the like Offence, 31 *Car.* 2. *Rot.* 239. *William Marſhal* 31 *Car.* 2. *Rot.* 240. And Mr. *John Hampden* had the like Judgment as *Burnett, &c.* 1 *Jac.* 2. upon confeſſing an Indictment of the ſame Kind with *Walcott*'s. Whereupon conſidering that many Precedents were without this, and that the eſſential Parts of the Puniſhment were in this Judgment, 'twas prayed that the Judgment of Reverſal might be Reverſed, and the Attainder confirmed.

Argument againſt the Original Judgment.

On the other Side it was argued, That the Original Judgment was Erroneous, and the Reverſal juſt. And firſt it was obſerved, That this Writ of Error was new and particular, *ex gravi querela* of the Counteſs of *Roſcommon*, who had nothing to do with the Record, was a mere Stranger to it, and yet 'tis ſuggeſted that the Reverſal was to her Damage.

Then 'twas urged that there was an Error in the firſt Judgment, for that the Judgment, in Caſe of Treaſon, is by the Common Law, and that it is and muſt be certain, and not at the Pleaſure of the Court which pronounces and gives it: That it ought to be ſevere, becauſe 'tis a Puniſhment for the greateſt Offence which can be committed, *Crimen læſæ Majeſtatis* a Sin of the firſt Magnitude, an Offence which imports Treachery to the Prince, Enmity to the Country, Defiance to all Government, a Deſign to overthrow and confound all Order and Property, and even the Community it ſelf; and in its Conſequence occaſions the Practiſe of all other Crimes whatſoever, as Murders, Burglaries, Robberies, *&c.* and therefore our Conſtitution hath impoſed upon it a ſevere and cruel Judgment, ſuch as the *Engliſh* do allow or permit in no other Caſe; the greateſt of other Crimes incur Death only; but for Treaſon the Judgment is different. Sir *Tho. Smith*'s Treatiſe *de Republica Anglic.* 198. there ought in Reaſon to be a Proportion between the Offence and the Puniſhment; and as this is the greateſt, ſo the Penalty is *morte multo atrocior*; and in *Fleta, lib.* 1.

p. 21. 'tis *cum aggravatione pœnæ corporalis*, ſomewhat more than Death. Then this being a Common Law Puniſhment, and not preſcribed by any Statute, the Knowledge of it muſt be fetcht from our Law Books and from Precedents; for the General Practiſe of the Realm is the Common Law; 'tis deſcribed with an *ipſo vivente* in *Smith's Republica Anglic. p.* 28. lat. Edit. *p.* 245. *Stamf.* 182. *en ſon view*, which is *tantamount*; and *Stamford* wrote 2 *El.* In *Coke's* 3 *Inſt.* 210. 'tis *ipſoque vivente comburentur*. *Pulton de Pace Regni* 224. and many other Books were cited to the ſame Effect: And 'twas affirmed that there was no Book, which recited the Judgment at large, but had this Particular in it. Several Books do in ſhort put it, That for Treaſon the Party ſhall be Drawn and Hanged and Quartered, but thoſe are only Hints of the chief Parts, not Recitals of the Judgment it ſelf. In the *Engliſh* Book of *Judgments*, printed 1655. *p.* 292. 'tis mentioned particularly as the *King's Bench* have adjudged it ſhould be. The Duke of *Buckingham's* was ſo, 13 *H.* 8. *Stow's Chronicle* 513. ſhews that he was the Perſon. Then 'twas ſaid, they have been thus in every Age without Interruption, till 26 *Car.* 2. *Humfrey Stafford's* Caſe 1 *H.* 7. 24. which was *per conſenſum omnium Juſticiariorum*, tho' quoted on the other Side as ſhortly ſtated in the *Year-Book*; yet on the Roll, which hath been ſeen and peruſed, 'tis with an *ipſo vivente*: *Plowden* 387. and *Raſtal's Entries* 645. the ſame Caſe, is thus; *Coke's Ent.* 699. is ſo likewiſe: *John Littleton* in 43 *Eliz.* *Coke's Ent.* 422, 423 and 366. is ſo. In the Lord *Stafford's* Caſe, 33 *Car.* 2. by the Direction of this Houſe, and with the Advice of all the Judges, was the Judgment ſo given by the Earl of *Nottingham* then Lord High Steward. In the Lord *Preſton's* Caſe 'tis ſo, which was drawn by Advice of the then Attorney and Solicitor, the preſent Keeper and Chief Juſtice of the *Common Pleas*.

Precedents for *ipſo vivente*.

As to the Objection, That *vivens proſternatur* doth imply it, and that's enough. It was anſwered, That *ipſo vivente comburentur* implies both, but not *econtra*; and all the Precedents ſhew the latter to be requiſite. And as to the Caſe of *David* Prince of *Wales* mentioned in *Fleta*, there's only a Relation of what was the Execution, not of what was the Judgment. And *Coke* 2 *Inſt.* 195. ſays, That the Judgment was in Parliament, and therefore the ſame can be no Precedent to this Purpoſe; and any one that runs over *Cotton's* Records, will find the Judgments in Parliament to be Different, as the Nature of the Caſe required. No Argument can be drawn from the Acts of the Legiſlature to govern Judiciary Proceedings; however, *John Hall's* Caſe, 1 *H.* 4. *Cott.* 401. is as now contended for. Before the 1 *H.* 7. there were ſome Erroneous Attainders; and the 29 *El.* takes Notice of them as ſo erroneous. The Judgments againſt *Benſon* and Sir *Andrew Helſey* (cited below) are plainly erroneous; they diſpoſe of the Quarters, which they ought not, but leave the ſame to the King's Pleaſure. Sir *Andrew's* Precedent is a monſtrous Arbitrary Command by Writ, to Commiſſioners of *Oyer* and *Terminer*, ordering them

to

to Examine him, and to give Judgment in manner as in the Writ is directed, that therefore is not to be juſtified; and 'twas before 25 *E.* 3. *Henry Ropers* 21 *R.* 2. doth diſpoſe of the Quarters, and hath other Errors in it; and ſo have *William Bathurſt*'s and *Henry South*'s, which were in 3 *H.* 4. But from that Time to 26 *Car.* 2. there's none which do admit it. The four Precedents at the *Old Baily* were againſt Popiſh Prieſts, and what private politick Reaſons or Commands might occaſion the Omiſſion, is unknown; and *Hampden* was not Executed, but his Judgment was upon a Confeſſion, and his Life ſaved, the Reaſon of which is alſo unknown: So that there have been none Executed upon ſuch Erroneous Judgments: And that there are no more Precedents, with the Omiſſion, is a good Argument, that thoſe many which have this Particular in them, are Good and Legal; the conſtant Current having been this way, proves the ſame to be the Common Law. And this is the moſt ſevere Part of the Puniſhment, to have his Bowels cut out while alive, and therefore not to be omitted. As to the Earl of *Eſſex*'s Caſe in *Moore*, and *Owen*'s Caſe in *Roll*'s *Rep.* the firſt is only a Report of the Caſe, and the laſt a Deſcant upon the Judgment, but neither do pretend to recite the whole Judgment.

Then to pretend that this Judgment cannot be Executed, is to arraign the Wiſdom and Knowledge of all the Judges and King's Counſel in all Reigns: And Tradition ſaith that *Harriſon*, one of the Regicides, did mount himſelf, and give the Executioner a Box on the Ear after his Body was opened.

Then 'twas argued, That if it be a neceſſary Part of the Judgment, and be omitted, it is a fatal Error, and doth undoubtedly in all Caſes give a good Reaſon for the Reverſal of ſuch Judgment, as in the Common Caſe of Debt, where *dampna* are omitted in the Judgment, tho' for the Advantage of the Defendant, as is *Beecher*'s Caſe, and *Yelv.* 107. Beſides, if this be legal, then all thoſe Attainders, in which this Particular is inſerted, muſt be illegal; for 'tis impoſſible that both the Judgments ſhould be right; for either thoſe are more ſevere than they ſhould be, or this is more remiſs. To ſay that 'tis Diſcretionary, is to give the Judges a Power, which they themſelves have diſclaimed; and to Reverſe this Reverſal, is to tell the Court of *King*'s *Bench*, that they are not obliged to follow the General Practiſe of their Predeceſſors; that they are obliged to no Form in their Judgment for Treaſon; that nothing but Death, and being drawn to it, are eſſential; and according to that Doctrine, a Woman might receive the Judgment of Quartering, and a Man might be burnt, and both according to Law. But the Conſtitution of this Kingdom hath preſcribed and fixed Rules and Forms, which the Executive Power is obliged and bound to follow; that as Nothing can be made or conſtrued to bean Offence at the Pleaſure of the Court, ſo no Judgment can be given for any known Offence at Pleaſure. But the Law, either Statute or Common, hath eſtabliſhed what is an Of-

fence, and what is its Puniſhment; and there is nothing of Arbitrary Power allowed in reſpect of either. Wherefore upon the whole it was prayed, that the Reverſal might be affirmed, and it was affirmed accordingly.

Judgment of Reverſal affirmed.

Sir Evan Lloyd, Bar. and Dame Mary his Wife, and Sidney Godolphin, Eſq; and Suſan his Wife, Appellants, verſus *Sir Richard Carew, Bar. an Infant, the Son and Heir of Sir John Carew, Bart. deceaſed, Reſpondents.*

APPEAL from a Decree of Diſmiſſion in *Chancery*. The Caſe was thus: *Rice Tannott* died ſeiſed in Fee of ſeveral Lands in the ſeveral Counties of *Salop*, *Denbigh* and *Montgomery*, leaving three Daughters and Coheirs, *Mary*, *Penelope* and *Suſan*. *Suſan* married *Sidney Godolphin*, one of the preſent Appellants. In *July* 1674. *Mary* and *Penelope*, in Conſideration of 4000 *l.* paid to the ſaid *Mary* by *Richard Carew*, Eſq; and in Conſideration of a Marriage to be had, and which was afterwards had, between *Penelope* and the ſaid *Richard Carew*, by Leaſe and Releaſe, convey all thoſe their two Parts of the ſaid Lands in *Denbigh*, *Salop* and *Montgomery*, to Truſtees and their Heirs, to the Uſe of *Richard Carew* for Life, then to *Penelope* for Life for her Jointure, then to the ſaid Truſtees and their Heirs, during the Lives of *Richard* and *Penelope*, to preſerve contingent Remainders; then to the firſt and other Sons of *Richard* and *Penelope* in Tail Male ſucceſſively; and in Default of Iſſue Male, to the Daughters of *Richard* and *Penelope* in Tail; and in Default of ſuch Iſſue, as to one Moiety of the ſaid two Parts, to the firſt and other Sons of the ſaid *Penelope* by any other Husband in Tail, the Remainder of all and ſingular the Premiſſes to the ſaid *Richard Carew* and his Heirs for ever, ſubject to this Proviſo, *That if it ſhould happen that no Iſſue of the ſaid* Richard, *upon the Body of the ſaid* Penelope, *ſhould be living at the Deceaſe of the Survivor of them, and the Heirs of the ſaid* Penelope *ſhould within twelve Months after the Deceaſe of the Survivor of the ſaid* Richard *and* Penelope *dying without Iſſue as aforeſaid, pay to the Heirs or Aſſigns of the ſaid* Richard Carew *the Sum of* 4000 l. *that then the Remainder in Fee-ſimple ſo limited to the ſaid* Richard Carew *and his Heirs ſhould ceaſe; and that then, and from thenceforth, the Premiſſes ſhould remain to the Uſe of the right Heirs of the ſaid* Penelope *for ever.*

Contingent Limitations after a Fee, if allowable, and when.

The Proviſo.

After this *Mary* intermarried with the Appellant Sir *Evan Lloyd*, and a Partition was made of the Premiſſes, and the ſame had been enjoyed accordingly ever ſince, and Mr. *Carew* and his Lady levied a Fine to Mr. *Godolphin* and his Lady of his Part; who did there-

thereupon by their Deed dated 23 *Sept.* 1676. covenant to levy a Fine of Mr. *Carew*'s two Parts to ſuch Uſes as he and his Lady ſhould limit and appoint, but have not yet levied the ſaid Fine.

Richard Carew and *Penelope* his Wife, to avoid all Controverſy that might happen, whereby the Eſtate of the ſaid *Richard Carew*, or his Heirs, might be queſtion'd or incumbred by the Heirs of *Penelope*; and to the End to extinguiſh and deſtroy and bar all ſuch Eſtate, Right, Title, Equitable or other Intereſt, as the ſaid *Penelope* then had, or her Iſſue and Heirs might have or claim to the ſame, by any Power, Settlement or Condition, on Payment of 4000 *l.* or otherwiſe to the Heirs of *Richard Carew* by the Heirs of the ſaid *Penelope*; and for the ſettling of the ſame on the ſaid *Richard Carew* and his Heirs, did in *Michaelmas* Term 1681. levy a Fine of the Share and Part allotted to them, and by Deed of *Decemb.* 1681. declare that the ſaid Fine ſhould be to the Uſe of the ſaid *Richard* for Life, Remainder to *Penelope* for Life, the Remainder to the ſaid *Richard Carew* his Heirs and Aſſigns for ever: And do further declare, That the Fine agreed to be levied by the Appellants *Sidney Godolphin* and *Suſan* his Wife, by their Deed dated the 23 *Sept.* 1676. ſhould be to the ſame Uſes, and then direct the Truſtees by the firſt Settlement to convey to thoſe Uſes.

Penelope died without Iſſue in 1690. *Richard Carew* made his Will in *Aug.* 1691. and deviſed the ſaid Lands to Sir *John Carew* Bar. his Brother, ſubject to pay all his Debts and Legacies, and made Sir *John Carew* his Executor.

In *Decemb.* 1691. *Richard Carew* died without Iſſue, and Sir *John Carew* entred, and was ſeiſed and poſſeſſed of the Premiſſes, and paid 4855 *l.* for the Debts of *Richard Carew*.

Sir *John Carew* died, and the Reſpondent, Sir *Richard Carew* an Infant, is his Son, Heir and Executor.

The Appellants, *Mary* and *Suſan*, claiming the Lands as Heirs to *Penelope* by Virtue of the ſaid Proviſo in the firſt Settlement upon Payment of the 4000 *l.* exhibited their Bill in *Chancery* to compel the Truſtees to convey the Eſtate to them upon ſuch Payment.

Bill diſmiſſed below.

Upon hearing of this Cauſe on Bill and Anſwer, the Court ordered a State of the Caſe to be drawn, which was as above; and afterwards the Court, aſſiſted by the Chief Juſtice of the *Common Pleas*, and Mr. Juſtice *Rooksby*, ſeeing no Cauſe to relieve the Plaintiffs diſmiſſed their Bill.

Argument for the Appellants. No Danger of a Perpetuity.

And now it was argued on Behalf of the Appellants, That ſuch Diſmiſſion ought to be ſet aſide; and amongſt other Things, it was inſiſted on in Favour of the Appeal, that this Proviſo was not void; that it was within the Reaſon of the Contingent Limitations allowed by the late Lord Chancellor *Nottingham* in the Caſe of the Duke of *Norfolk*, and there were quoted ſeveral Paragraphs in the Argument made by the ſaid Lord Chancellor, as

that future Intereſts, ſpringing Truſts, or Truſts Executory, Remainders that are to emerge or ariſe upon Contingency, are quite out of the Rules and Reaſons of Perpetuities; nay, out of the Reaſon, upon which the Policy of the Law is founded in thoſe Caſes; eſpecially if they be not of remote or long Conſideration, but ſuch as by a natural and eaſy Interpretation will ſpeedily wear out, and ſo Things come to the right Channel again: That tho' there can be no Remainders limited after a Fee-ſimple, yet there may be a Contingent Fee-ſimple ariſe out of the firſt Fee; that the *ultimum quod ſit*, or the utmoſt Limitation of a Fee upon a Fee is not yet plainly determined; that tho' it be impoſſible to limit a Remainder of a Fee upon a Fee, yet 'tis not impoſſible to limit a Contingent Fee upon a Fee; that no Conveyance is ever to be ſet aſide in *Chancery*, where it can be ſupported by a reaſonable Conſtruction, eſpecially where 'tis a Family Settlement. Then theſe Paragraphs were applied; and further urged, That there could not in Reaſon be any Difference between a Contingency to happen during Life or Lives, or within one Year afterwards; that the true Reaſon of ſuch Opinions, which allowed them if happening within the Time of the Parties lives, or upon their Deceaſes, was becauſe no Inconvenience could be apprehended thereby; and the ſame Reaſon will hold to one Year afterwards; and the true Rule is to fix Limits and Boundaries to ſuch Limitations, when ſo made, as that they prove Inconvenient, and not otherwiſe: That this Limitation upon this Contingency happening, was the conſiderate Intention of the Family, the Circumſtances whereof required Conſideration, and this Settlement was the Reſult of it, and made by good Advice: That the Fine could not bar the Benefit of this Proviſo; for that the ſame never was, nor ever could be in *Penelope*, who levied the Fine.

As to the Pretence, That if the Appellants were relieved, *Richard Carew* who married *Penelope* would have no Portion with her: 'Twas anſwered, That that could not alter the Caſe; the Agreement and Intention of the Parties being the moſt conſiderable Matter, and beſides, *Richard* enjoyed the Eſtate during his Life without Impeachment of Waſte. And as to the Debts, 'twas anſwered, That thoſe were no Ingredients in the Queſtion; however there would be 4000*l.* paid towards it, and the Perſonal Eſtate was more than enough to pay the Reſidue. For which, and other Reaſons, 'twas prayed that the Diſmiſſion might be reverſed.

Argument for the Reſpondents.

On the other Side it was inſiſted on with the Decree, 1. That the Limitation by the Settlement in *July* 1674. to the Heirs of *Penelope*, upon Payment of 4000*l.* by them to the Heirs of *Richard Carew*, within twelve Months after the Death of *Richard* and *Penelope* without Iſſue, at the Time of the Deceaſe of the Survivor of them, is a void Limitation, the Fee-ſimple being before limited to *Richard* and his Heirs, and ſo not capable of a further

further Limitation, unleſs upon a Contingency to happen in the Life of one or more Perſons in Being at the Time of the Settlement; which is the furtheſt that the Judges have ever yet gone in allowing theſe Contingent Limitations upon a Fee; and which were the Bounds ſet to theſe Limitations by the late Lord Chancellor *Nottingham*, in the Caſe of the Duke of *Norfolk*. That tho' there were ſuch Expreſſions as had been read on the other ſide, yet the Bounds ſet by him to theſe Limitations, were only dependent upon Life or Lives in Being, and never as yet went any further: And if they ſhould be extended, and allowed to be good upon Contingencies to happen within twelve Months after the Death of one or more Perſons, they may be as well allowed upon Contingencies to happen within a thouſand Years; by which all the Miſchiefs, that are the neceſſary Conſequents of Perpetuities, which have been ſo induſtriouſly avoided in all Ages, will be let in; and the Owner of a Fee-ſimple thus clogged would be no more capable of providing for the Neceſſities and Accidents of his Family, than a bare Tenant for Life.

2. If this Limitation were good, 'twas urged, That the Eſtate limited to the Heirs of *Penelope* was virtually in her, and her Heirs muſt claim by Deſcent from her, and not as Purchaſors; and by Conſequence this Eſtate is effectually barred by the Fine of *Penelope*: The Deſign of limiting this Power to the Heirs not being to exclude the Anceſtor; but becauſe the Power could not in its Nature be executed until after the Deceaſe of the Anceſtor, it being to take effect upon a Contingency that could not happen till after that Time; and this Bill and Appeal was not only to have the ſaid *Richard Carew*, who married *Penelope*, to have not one Farthing Portion with his Wife, but to make the now Reſpondent Sir *Richard Carew* to loſe the 4855 *l.* which his Father Sir *John Carew* paid, as charged on the Lands in Queſtion. For which Reaſons, and many others well urged about the Miſchief and Danger of Perpetuities, and their Increaſe of late Years, to the Intangling and Ruin of many Families, it was prayed that the Decree of Diſmiſſion might be affirmed: But the ſame was reverſed.

Decree of Diſmiſſion reverſed.

Sir William Morley, Knight of the Bath, Plaintiff, verſus *Peter Jones, Defendant.*

Uſes of a Fine how declared, and by what Deeds. 4 Mod. 261 to 269. Carth. 410. 2 Salk. 677.

WRIT of Error to Reverſe a Judgment in *B. R.* in Ejectment upon the Demiſe of *Bellingham*, upon a ſpecial Verdict, which finds, That *Anne Boxyer*, Spinſter, was ſeiſed in Fee of the Manor of *Frencham*; that the ſaid *Anne* and *Ed. Morley*, Eſq; and Sir *Will.* and *J. Wells ante tempus quo, &c. viz.* 22 *July* 1664. did

did make, and as their Deed deliver, a certain Indenture with their Seals ſealed, whereby the ſaid *Anne* demiſes the Manor aforeſaid to Sir *William* and *Wells*, and their Executors, for one Month from the Day next before the Day of the Date; that Sir *W.* and *Wells* entred and were poſſeſſed; that they the 23d of *July* in the ſaid Year ſealed, and as their Deed delivered, another Indenture with their Seals ſealed, whereby the ſaid *Anne*, reciting a Marriage intended between *Anne* and *Edward*; and that *Edward* had agreed to ſettle a Jointure out of his Lands to the Value of 300 *l. per Annum*; and that the ſaid *Anne* had agreed, in caſe the Marriage took effect, and a Jointure were made, as aforeſaid, to ſettle the ſaid Manor on him and his Heirs, and to particular Truſts after-mentioned, until the ſame be performed. She the ſaid *Anne*, in Conſideration of the Marriage, and in Performance of the Agreement on her Part, Bargains, Releaſes and Confirms to Sir *W.* and *Wells* their Heirs, the ſaid Manor, and all her Right, *&c.* and the Reverſion, *&c.* in Truſt for the ſaid *Anne* and her Heirs, until the Marriage take effect, and Aſſurance of a Jointure be made as aforeſaid; and after ſuch Marriage and Aſſurance of ſu h Value as aforeſaid, then to the Uſe of *Edward* and his Heirs, *&c.*

Then the 1ſt of *Auguſt* 1664. a Marriage was had; then the 29th of *Jan.* 1665. a Deed is executed between the ſaid *Edward* and *Anne* of the firſt Part, and *Young* and *Truſter* as Truſtees on the other Part, reciting that a Fine is already acknowledged, and agreed to be levied in due Form of Law next *Hillary* Term, between the ſaid *Young* and *Truſter* Plaintiffs, and the ſaid *Edward* and *Anne* his Wife, of the ſaid Manor of *Frencham*, and thereby declared that the ſaid Fine ſhould be to the Uſe of *Edward* and his Heirs. Two Days after the Execution of that Deed, and before the Fine levied, *viz.* 31 *Jan.* 1665. another Writing indented was made and executed under Seal, between the ſaid *Edward* of the one Part, and the ſaid *Anne* of the other Part, whereby they both, in Conſideration of the ſaid Marriage and other good Cauſes, did Covenant, Conſent and Agree to revoke all former Grants, Bargains, Contracts, Writings, Covenants and Obligations made or done between them, or any other for them, until the ſaid *Edward* had performed the Agreements in the ſaid Marriage Settlement on his Part, both in Law and Equity; and that in Default thereof, it might be lawful for the ſaid *Anne* and her Heirs to enter into the ſaid Manor and Land, conveyed by the ſaid Settlement, without the Lett of the ſaid *Edward* and his Heirs.

Afterwards the Fine was levied *Octabis Purificationis*, which was the 9th of *February* in that Term: And afterwards by Indenture between the ſaid *Edward Morley* of the one Part, and one *Henry Doble* of the other Part, dated 9 *July* 1666. the ſaid *Edward*, in Conſideration of 600 *l.* Mortgages the ſaid Manor to *Doble* and his Heirs: Then the Money not being paid by *Edward Morley* to *Doble*, *Doble* did 2 *June* 1676. in Conſideration of 600 *l.* with Intereſt, paid by Sir *William Morley*, convey the ſaid Manor to one *Thomas Young*; that *Edward Morley* did never convey

the Lands agreed to be conveyed for a Jointure to the Value of 300*l. per Annum*, but did ſettle and convey only Part, which was of the Value of 250*l. per Annum*, and no more, and that ſubject and liable to the Payment of 15*l.* Yearly for ever to a Stranger. The ſaid *Anne* dies without Iſſue, and *Henry Bellingham* was Coſin and next Heir, *Et ſi, &c.* And Judgment was given in *B. R. pro quer'*.

Argument for the Plaintiff in Error.

It was argued on the Behalf of Sir *William Morley*, That this Judgment was Erroneous; that the firſt Deed, and the Matter of the Jointure was nothing in the Caſe; that the Queſtion was, to what Uſes the Fine was levied? That the Deed executed under Seal between *Edward* and *Anne*, and the Truſtees, did effectually declare the Uſes of this Fine, and that the ſecond Inſtrument cannot be made Uſe of, as a Deed to controul the former; that the firſt was fairly made, and all Parties requiſite concurring to it. And that of 31 *Jan.* was not a Deed; for a Man cannot make a Deed to his Wife, or to himſelf; this cannot be conſtrued a Deed Poll, when 'tis Indented; for that is to conſtrue a Thing different from what it is: Intent may be conſtrued, but one Thing or Sort of Inſtrument can never be taken for another. Then ſuppoſing it a Deed Poll, it doth not revoke, it takes no Notice of the Fine or the Deed; it hath no Reference to either of them; it ſays that all Agreements are to be void; but how? 'Tis not abſolutely; only till a particular Thing be done: So that 'tis not a Revocation, ſo as to annul the Deed of the 29th, and the Husband by this neither did, nor could direct the Uſe of the Fine to be to the Wife. Suppoſe that, before the Statute of Uſes, a Man had declared an Uſe to his Wife, it was no Truſt or Uſe, for that no *Subpœna* lay at the Inſtance of the Wife againſt the Huſband. A Man could not be a Truſtee for his Wife. Now no Uſe can be executed by the Statute, but where a *Subpœna* did lie before the Statute to compel the Enjoyment according to it: And therefore 'tis, that a Corporation could not be ſeiſed to an Uſe, becauſe no *Subpœna*; and no *Subpœua*, becauſe no Attachment lay againſt a Body Corporate. Suppoſe the laſt Deed to be any Thing, 'tis only a Parol Evidence, and that will not revoke the firſt Deed.

Then here's no Variance between the Fine and the Deed of the 29th: The Deed ſays a Fine is already acknowledged, and to be levied the next *Hillary* Term, between the ſame Parties, and of the ſame Lands: This is either the next *Hillary* Term after the Conuſance of the Fine, or after the Deed: Then 'tis not uſual to acknowledge a Fine, and levy it a Year after; 'tis not allowable in Practiſe, and therefore 'tis not to be ſo Expounded; for Men are to be intended to act reaſonably, and according to Common Uſage. Now 'tis true, it doth not appear when the Caption was, whether in or before the Term; yet common Intendment muſt carry it, that the Caption was before the Term, and ſo 'twas to be a Fine of that Term, or to be in or before the next *Hillary*; the Parties deſigned not the Fine ſhould lie for one whole Year:

If it had been in or before, it had been well enough; then, tho' thoſe Words are not in, it is plain that the Intent was ſo. The Earl of *Rutland*'s Caſe was upon Evidence, and not upon Pleading. If levied before the Time, that is well. The next *Hillary* Term, is no more, than on or before; or in *Hillary* next at the furtheſt, or by *Hillary* Term next: Theſe all do ſound much to the ſame Purpoſe in common Underſtanding. The End of a good Conſtruction is to ſupply the Defects of Expreſſion; then taking it for the next *Hillary* Term after that Term. If I do a Thing before the Time, 'tis done in Purſuance of the Intent; for the Day given is for the Advantage of the Party, who hath Liberty given to forbear the Act during all that Space, till the laſt Day of the Time given; but if he doth it ſooner, the End is fulfilled; ſo Payment before is always reckoned as Payment at the Day. And 'tis ſo in all Caſes, where the Time is not in the moſt conſiderable Part of the Agreement, as in Harveſt, in Winter, or the like; and the Nature of the Act is ſuch, that 'tis moſt convenient for the Obligee or Covenantee to have it at that Seaſon, and not before. In the Earl of *Rutland*'s Caſe, 'tis agreed if within the Time, 'tis good. Will any Man ſay that this is not the Fine which was meant? If a Covenant be to make a Feoffment in *Trin.* Term next, ſuch a Feoffment before fulfils the Covenant: This is not a Fine acknowledg'd by any other Parties, of any other Lands, or upon any other Agreement. Suppoſe a Man had a Power of Revocation by Deed under Seal with Witneſſes, and had covenanted in ſuch Manner to levy a Fine before this Day Twelve-month, and before the Day he had levied a Fine; now the Deed was no Revocation, becauſe not expreſs, and of itſelf made no Alteration in the Eſtate; and the Fine of it ſelf was not, becauſe not by Deed atteſted; but both together make a Revocation; they are but one Conveyance, as was adjudged in the two Caſes of *Wigſon* and *Garret*, and *Herring* and *Brown*; ſhould not this have been a Revocation? Either this firſt was deſigned to deceive the Wife, or the ſecond was deſigned to deceive Creditors and Mortgages; the Creditor is to be preferred. Suppoſe the firſt were made, as 'tis moſt likely, to enable him to borrow Money, 'twould be hard to conſtrue the ſecond Good: Would any Purchaſor have doubted this Title, if he had ſeen the Fine and this Deed of the 29th? To allow this ſecond, is to countenance a Practiſe which may deceive any Man; for a Deed precedent leading the Uſes of a Fine is binding, and concludes againſt any Thing but an intermediate Deed between that and the Fine; and ſuch private Agreement between Husband and Wife may be had and pretended in any Caſe whatſoever. Then was cited *Havergill* and *Hare*, 2 *Rolls* 799. And 'twas further ſaid, that againſt a Mortgagee the ſecond will be void, according to *Proger*'s Caſe, 1 *Sid.* 133. A Conveyance voluntary, that was good in its firſt Creation, may become void by ſubſequent Accidents; and in Truth it was admitted below, that this ſecond Writing was no Deed, had no more Efficacy than a Parol

Deed and Fine are but one Conveyance.

Aver-

Averment; and conſequently the only *Quære* can be, If this Fine be another, and different from that which was meant and intended by the Deed of the 29th? For if it be not, then Parol Averments or Agreements ought not to be admitted. Beſides, this is but Evidence, nor proper for the Court to conſider, and the Jury ſhould have concluded ſpecially, That if Parol Evidence, or a naked Averment ſhould be admitted, then they find to ſuch Uſes: But here 'tis like finding the Badges of Fraud, without finding the Fraud it ſelf; or a Demand and Denial, without finding a Converſion; upon neither of which can the Court judge the Thing to be a Fraud or a Converſion. And for theſe and other like Reaſons it was prayed, that the Judgment might be reverſed.

Argument for the Defendant in Error. Where Averment allowable, or not.

It was argued on the other Side with the Judgment, That this Fine thus levied was not to the Uſe of the Husband, but of the Wife and her Heirs; that the Fine is not to the Uſes in the Deed of the 29th, but controlled by that of the 31ſt. 'Twas agreed, that if there be a Deed to levy a Fine, and in Purſuance thereof a Fine is levied, to the Perſon, of the Lands, and at the Time, no Proof ſhall be allowed, that the Fine was to any other Uſe: But if it be in caſe of a ſubſequent Deed, then Averment may be againſt it; but by the making of a precedent Deed, all Parties are eſtopped to contradict it, unleſs there be another Deed of equal Nature to control that. Where the Deed is punctually obſerved, there is no Liberty to aver the Contrary; but where 'tis not purſued, the Averment is conſiſtent. Where it doth vary, yet if nothing doth appear to the contrary, there the Fine ſhall be conſtrued to be to the Uſes of the Deed by Conſtruction of Law; a Wife is bound by the Husband's Declaration; and if the Fine be in Purſuance of the Husband's Deed, 'tis as binding to her, as if ſhe were a Party: An Infant cannot avoid a Fine, where there was a Deed agreeable, but by reverſing it.

'Then 'twas argued, That here was ſuch a Variance as did allow of ſuch Averment; that 'tis True, the Deed of 29. had been a good Declaration of the Uſes of this Fine, notwithſtanding the Variance, if the Writing of 31. had not been made; but there being a Variance, that is admiſſible; that this Fine now found differs as much from that in the Deed, as if it had been levied at a Time after; that levying it before, makes it not the ſame. The Woman perhaps here did agree to levy a Fine at this Diſtance of Time, that ſhe might in the mean while have a competent Proviſion out of her Husband's Eſtate for her Jointure, then when ſhe levies this Fine at a different Time, ſhe doth not do it in Purſuance of the firſt Deed. Then 1 *Rep.* 76, 99. 3 *Bulſtr.* 231. 2 *Rolls Abridg.* 251. 2 *Cro.* 646. 2 *Rolls Abridg.* 799. *Savil* 124. 1 *Leon.* 210. 3 *Cro.* 210. 1 *And.* 240. were quoted, and either anſwered or applied to this Point of Variance.

Then 'twas ſaid, That there was a Difference between a Fine that varies from a precedent Deed, and a Fine that is followed with a ſubſequent Deed or Declaration of Uſes. If there be a

ſubſequent Declaration, the Heir at Law cannot aver that 'twas to the Uſe of the Conuſor and his Heirs, or to any other Uſe than what is in the Deed; the Party himſelf or his Heirs cannot aver it, but they are eſtopped by this Deed, tho' ſubſequent; however, a Stranger is at liberty to make ſuch Averment: But if a Deed be precedent, and the Fine varies, and is not the ſame, there none are eſtopped, neither the Party himſelf, his Heir, nor a Stranger; becauſe the Fine ſtands alone, without any Deed referring to it, and declaring the Uſes of it.

By what Means the Uſe of a Fine ariſes.

'Then 'twas urged, That this ſecond Deed was ſufficient to declare the Uſes of this Fine: If the Uſe ariſe upon, or by Tranſmutation of the Poſſeſſion, as by Fine or Feoffment, 'tis ſufficient without any Deed; the Uſe ariſes only upon the Party's Declaration or Appointment: If without a Tranſmutation of Poſſeſſion, there muſt be ſome Agreement binding the Party upon ſome Conſideration; for the Uſe being founded in Equity, the *Chancery* would never relieve, where there was no Tranſmutation of Poſſeſſion, or Agreement upon Conſideration; and if in Conſideration of Blood, it muſt be by Deed; becauſe the Conſideration is not binding without it. *Moore's Rep. Callow* and *Callow.* If this Writing of 31. had expreſly declared, that it ſhould enure to the Husband and his Heirs upon ſuch a Contingency, this had been a good original Declaration of the Uſe; and would have altered the Eſtate, becauſe of the Tranſmutation of the Poſſeſſion: And as 'tis now penned, 'tis a good Writing, ſufficient to declare the Uſes of the Fine. Any ſort of Agreement, whereby the Parties Intent appears is ſufficient. An Uſe is an equitable Thing; and if it appears to have been intended, that is enough, 2 *Leon.* 14. *Brent's* Caſe: Any Agreement between the Party that hath the Eſtate, and him who is to have it, may raiſe an Uſe in this Caſe. A Bargain and Sale of the Lands carries the Uſe, tho' no Mention of it: 8 *Rep. Fox's* Caſe, *Croſſing* and *Scudamore*; in this Caſe there was an Agreement between Husband and Wife, that he ſhould have the Lands, if he made a Jointure. A Bargain and Sale, tho' not inrolled, a Charter of Feoffment without Livery, ſhall raiſe the Uſe of a Fine levied between the ſame Parties; therefore this Writing is a good Appointment. But ſuppoſe it were not of it ſelf, 'tis ſufficient to control that of the 29th; for 'tis agreed thereby, that all Deeds ſhall be revoked; which ſhews plainly, that the Fine was not to be to the Uſes mentioned in that Deed, eſpecially when it varies from it. A Parol Declaration of the Mind of the Party will be enough to control and hinder the Raiſing of an Uſe by the Deed and Fine, where different; and if ſo, then the Uſe here is to the Wife and her Heirs. Then ſuppoſing the Variance frivolous and immaterial, this Writing of the Husband and Wife is a good Appointment. The Truſtees or Conuſees of the Fine need not to be Parties to the Appointing or Declaring of the Uſes: The Indenture precedent is but directory, and if there be another Direction under Seal before the Fine, it muſt over-rule the firſt.

Writing of it ſelf ſeems enough, 2 *Cro.* 29. 3 *Cro.* 571. But ſuppoſe an Indorſment on the Indenture revoking one Uſe, before the Fine be levied, would not that control it? This is rather like a laſt Will, and the laſt before the Fine muſt ſtand. A Covenant to ſtand ſeiſed muſt have all the neceſſary Parts of a Deed, ſo as to have been obligatory in *Chancery* before the Statute; but a mere Declaration of Uſes need not to be formal. The Uſe declared by 29th was always revokable till the Fine was levied: And this is ſufficient both to revoke the laſt Declaration, and to declare new Uſes. This amounts at leaſt to a Deed Poll, and therefore ſufficient. Then were cited *Moor* 22, 512. *Latch* 139. and many other Authorities: And upon the whole it was prayed, that the Judgment ſhould be affirmed; and it was affirmed.

Judgment affirmed.

Sir Edw. Hungerford and John Hill, Executors and Deviſees of Sir Will. Baſſet deceaſed, Plaintiffs, verſus *Edw. Noſworthy, Defendant.*

Whether a Will can be revoked by a ſubſequent Will, the Contents whereof are unknown. 3 Mod. 203. Hard. 374. 1 Show. 537. by the Name of *Hitchins* verſus *Baſſet.*

WRIT of Error to Reverſe a Judgment in *B. R.* upon a ſpecial Verdict in Ejectment by *Hitchins* the Leſſee of *Noſworthy*, againſt Sir *William Baſſet*, Defendant, for the Manor of *Lanrock* and other Lands in *Cornwall*; wherein, upon Not guilty pleaded, and a Trial at Bar, the Jury find, That Sir *Henry Killegrew* was ſeiſed in Fee of the Lands in Queſtion; and on the 12th of *November* 1644. made his Will in Writing, which follows in theſe Words, *I Henry Killegrew, &c.* and ſo they ſet forth the Will, whereby Sir *Henry Killegrew* deviſed the Premiſſes to Mrs. *Jane Berkley* (his near Kinſwoman) for Life; with Remainder over to *Henry Killegrew*, alias *Hill* (Sir *Henry*'s Natural Son) in Tail, and makes Mrs. *Berkley* ſole Executrix. They further find, that after the making of that Teſtament, and before the Time when, *&c. viz.* about the Feaſt of St. *Michael* in the Year 1645. *Condidit & fecit aliud Teſtamentum in ſcriptis, ſed quod fuit content' in eodem ult' mentionat' Teſtamento, vel quale fuit purportum ſive effectus inde, juratoribus præd' non conſtat.* And that Sir *Henry* on the 29th of *September* 1646. died ſeiſed of the ſaid Lands; that Mrs. *Jane Berkley*, Deviſee of the ſaid Will, in 1644. by Leaſe and Releaſe conveyed to Mr. *Noſworthy*'s Father, and that the Father died in 1684. that Mr. *Noſworthy* is Son and Heir to him; that Sir *William Baſſet* is Coſin and Heir to Sir *Henry*, *viz.* Son and Heir of *Elizabeth Baſſet*, Daughter and Heir of Sir *Joſeph Killegrew*, elder Brother of Sir *Henry* the Teſtator; that *Noſworthy*, the Leſſor of the Plaintiff, entred and made the Leaſe in the Declaration, *&c.* But upon

the whole Matter, whether the ſaid Teſtament made in Writing 1645. was a Revocation in Law of the ſaid Deviſe of the ſaid Lands to Mrs. *Berkley*, they are ignorant, and pray the Judgment of the Court, *Et ſi*; And upon this Judgment was given for the Plaintiff in the Ejectment.

And now it was argued, That the Judgment was Erroneous; that this laſt Will could not be taken to be a Duplicate of the Former, but muſt be deemed a Revocation. That no Will is good but the Laſt; that every Will is revokable till Death; that the making of another doth import a Revocation of all former ones, tho' it be not ſo expreſly declared in Writing; for it muſt be the laſt, or nothing. That this Conveyance by Will was anciently a Privilege by the Civil Law, for People *in Extremis*, who had not the Time or Aſſiſtance neceſſary to make a formal Alienation; and chiefly intended for Military Men, who were always ſuppoſed to be under thoſe Circumſtances; and therefore the Ceremonies and Number of Witneſſes required of others, were diſpenſed with, as to Soldiers. But now the Rules for Military Teſtaments, as they are called, are allowed in moſt Caſes. That as to Lands, by our Law, was a Privilege only given to ſome Boroughs and Places within the Kingdom; and particular Cuſtom gave the Liberty of diſpoſing Lands or Houſes by Will, and that by nuncupative Will or Parol without Writing; ſo is *Bracton, lib.* 4. *fol.* 272. *Fleta, lib.* 5. *cap.* 5. *Poteſt legari, ut catallum, tam hæreditas quam perquiſitum, per Barones* London *& Burgenſes* Oxon, 1 *Inſt.* 111. that then came the Statute of *H.* 8. and impowers a Deviſe by a Man's laſt Will and Teſtament in Writing; but ſtill 'tis by his laſt Will. And ſo is *Littleton, ſect.* 168. If divers Wills, the latter ſhall ſtand, and the others are void, 1 *Inſt.* 112. In Truth 'tis plain Law, the firſt Grant and the laſt Teſtament. In *Swinb.* 1 *part, ſect.* 5. *p.* 14. no Man can die with two Wills, but he may with divers Codicils; and the latter doth not hinder the former, ſo long as they be not contrary. Another Difference there is between Wills and Codicils: If two Teſtaments be found, and it can't be known, which is firſt or laſt, both are void; but the latter Countermands the firſt, tho' there be a Clauſe in the firſt, that it ſhall not be revoked, and tho' an Oath were taken not to revoke; becauſe the Law is ſo, and the very Making of a latter doth revoke the former: So is *Linwood's Provincial de Teſtamentis*; Juſtice *Dodderidge's Office of Executor*, publiſhed by *Wentworth* 29. A verbal Will revokes a former written Will, *Forſe* and *Hembling*, 4 *Rep.* 60, 61. *Plowd.* 541. *Perkins, ſect.* 178, 179. and *ſect.* 478. The 2 *H.* 5. 8. is full to this Purpoſe. There's an Action by an Executor againſt two Executors, and they plead a Teſtament whereby they are made Executors; and the Plaintiff replies, that the Teſtator afterwards made another and himſelf Executor; and held that by the ſecond the firſt became void. Now the Meaning of theſe Books cannot be, that a Will expreſly revoking, is the only Will that can make a Revocation; nor is it, that a Contrariety or Repugnance between the one and the other, is neceſſary to make a Revocation: For tho' there

Argument for the Plaintiff in Error. That a ſubſequent Will revokes the former.

Military or Unſolemn Will by the Civil Law.

Local Cuſtoms of Deviſing at the Common Law.

Made general by Statutes.

there be no new Will made, yet a Revocation may be by Word of Mouth, as 2 *Cro.* 49, 115. 1 *Cro.* 51. 3 *Cro.* 781. nay, a void Bequeſt ſhall revoke a Will; ſo ſhall a Deed that hath no Effect, as Feoffment without Livery; a Deviſe to *J. S.* or to a Corporation, when there is no ſuch, will do it: So that 'tis not the Contradiction between the Diſpoſal which revokes, for that which is no Diſpoſition at all will do it. Wherefore the Meaning of the Authors cited is ſomewhat elſe; and it can only be this, That there is ſomewhat particular in a Will, to that Inſtrument of Conveyance, more than to any other, that even the Making of a new Will is a ſufficient Revocation; the Words are plain, by the making new Will the former are all deſtroyed; for there can be but one laſt. And when a Man makes and declares a new Will, that new Will muſt be preſumed to contain his whole Mind concerning the Diſpoſition of his Eſtate. Declaring his Will imports thus much, and excludes all other. When a Man would alter Part of his Will, there is a proper Inſtrument for it, called a Codicil, which is known in the Law as well as that of a Will: Here's nothing found of a Reference to the former. To judge it otherwiſe, would confound the Uſe of Wills and Codicils, and the Difference between them. 'Tis true that a Man may make partial Wills of ſeveral Parts of his Eſtate, and all may ſtand together; but then they muſt be declared to be Wills concerning particular Things; and they are but ſeveral Pieces of the ſame Will, tho' written in different Papers: But then in pleading one of them, you muſt not generally ſay he made *ult' voluntatem*, but *ultimam voluntat'* of ſuch a Thing: But here 'tis *aliud teſtamentum*, i. e. a general Teſtament. The 2 *Rich.* 3 *fol.* 3. is directly thus, The Defendant pleads one Will, the Plaintiff replies another, and Exception taken, becauſe he did not traverſe the former, but held needleſs to do ſo, *quia per ult' teſtamentum, ut placitatur generaliter, primum teſtamentum revocatur in omnibus:* And it cannot be pretended, that this might be the ſame Will written over again; for if ſo, it could not be *aliud*; it would be the ſame. Theſe are not Quibbles upon Words; for can it be ſaid that this is a Deviſe by the laſt Will of Sir *H.* when there is another. Nor is it an Objection, that the Contents do not appear; for the Will belongs not to the Heir to keep, and conſequently not to ſhew; in pleading he is not bound to a *Profert*; it is enough that there was a ſubſequent Will. And as the latter may Confirm or be conſiſtent with the former, ſo it may not be ſo; and the Conſiſtency is not to be preſumed, eſpecially againſt an Heir at Law, and in Poſſeſſion. In the Caſe of *Coward* and *Marſhal*, 3 *Cro.* 721. the Subſtance of both are declared, and thereby they appeared to be Conſiſtent, and conſequently no Revocation. Here *Eadem mens ſic teſtandi*, the ſame Intent of diſpoſing his Eſtate the ſame Way can never be thought to continue, for then there had been no Occaſion of making another Will. If this be not a Revocation, it is an Act void, and to no Purpoſe, which is never to be intended. Then it was inſiſted on, That the bare Act of making and publiſhing another Will, is a Revocation;

Difference between Wills and Codicils.

and the Finding of the Contents unknown is void: If this be not a Will, 'tis a Codicil; and that is contrary to the finding of the Jury: For the Verdict mentions a ſecond Subſtantive independent Will, without Reference to the former; which ſecond Will is a Revocation: And therefore 'twas prayed that the Judgment ſhould be reverſed.

Argument for the Defendant in Error.

It was argued on the other Side, in Behalf of Mr. *Noſworthy*, That this was no Revocation. That here had been a great Stir about Nothing, for that Nothing appeared againſt his Title; that a Man may make a Will of ſeveral Things at ſeveral Times, and they both ſhall ſtand; that a deliberate Will being made, the Contents whereof are known, ſhall never be revoked by that which is not known: Nothing can be judged upon that which doth not appear, and conſequently it can never be judged to be a Revocation. Here's another Will, and nothing is given by it, nothing is found to be given by this ſubſequent Will. The Form of entring the ancient Judgments was, *Quibus viſis, lectis & auditis, & per Curiam plene intellectis*; now what is here read to make a Revocation? 2 *R.* 3. *fol.* 3. is with the Judgment; for there 'tis replied that he made another Executor; there are the Contents pleaded, ſufficient to maintain his Count, and anſwer the Defendant's Bar; the Book is, *per hoc quod alius Executor nominatur*. Then was cited 1 *Cro.* 51. the Reaſon given is, *quia in dubiis non præſumitur pro teſtamento*, and here being a good Will, at the moſt the other is doubtful. 1 *Cro.* 114, 115. Several Wills of ſeveral Things may be made. And the ſame Book 595. 10 *Car.* 1. which Reſolution Serjeant *Maynard*, in arguing this Caſe below, ſaid that he heard in the Court of *King*'s *Bench*. 'Tis the ſubject Matter of the Wills and the Repugnancy which makes the Revocation. In this very Caſe, in the Exchequer, upon an *Engliſh* Bill, 'twas held by *Hale* to be no Revocation: 'Tis in *Hardres* 375. *Coke* upon *Littleton*, which hath been quoted, comments upon theſe Words *ſeveral Deviſes*, and if there be no Deviſe in the Second, there can be no Senſe or Meaning in it; and conſequently unleſs ſome Meaning appear, it can never be an Evidence of a Change of his Mind. As it might be a Revocation, ſo it might be otherwiſe; and he, that will have it to be a Revocation, muſt prove it to be ſuch. No Man can affirm that every Will muſt neceſſarily be a Revocation of a former, for the ſecond Will might be of another Thing, as Goods; or of another Parcel of Land; or in Confirmation of the Former. If in theſe, and many other like Caſes, a latter Will is no Revocation of a former, how can it poſſibly with Juſtice be concluded, that a latter Will without Contents, Purport or Effect, ſhall be a Revocation of a former? And tho' the Jury have in this Caſe believed the Witneſſes, and found that another Will was made, it may be of dangerous Conſequence to incourage and conſtrue this a Revocation, without knowing the Contents; for no Will can be ſecure againſt the Swearing of a new Will, if there be no Neceſſity of ſhewing it, or proving what it was. For which, and other Reaſons, it was prayed that the Judgment might be affirmed; and it was affirmed.

Judgment affirmed.

Sir William Leach & al', Plaintiffs, verſus *J. Thomſon Leſſee of Charles Leach, Defendant.*

Non compos mentis. Whether his Acts void. Salk. 576. 3 Mod. 301. 2 Vent. 198. 1 Show. 296, *&c.*

WRIT of Error to reverſe a Judgment given in *B. R.* upon a ſpecial Verdict, on a Trial at Bar in Ejectment brought by *Thomſon* on the Demiſe of *Charles Leach:* The ſpecial Verdict finds, that *Nicholas Leach* was ſeiſed of the Lands in Queſtion in his Demeſne as of Fee; and being ſo ſeiſed 9 *Nov.* 19 *Car.* 2. he makes his laſt Will, and thereby deviſes the Premiſſes to the Heirs Males of his Body lawfully to be begotten; and for Default of ſuch Iſſue, to *Simon Leach* his Brother for his Life, and after his Deceaſe to the firſt Son of the Body of the ſaid *Simon* lawfully to be begotten, and the Heirs Males of the Body of ſuch firſt Son lawfully to be begotten; and for Default of ſuch Iſſue, to the ſecond, *&c.* and ſo on to the eighth Son, and of all and every other Sons, *&c.* and for Default of ſuch Iſſue, to Sir *Simon Leach*, his Kinſman, Son and Heir of *Simon Leach* of *Cadley in Com' Devon'*, Eſq; deceaſed, and the Heirs Males of his Body; and for Default of ſuch Iſſue, to the right Heirs of him the ſaid *Nicholas* for ever.

Then they find, That the Lands in the Declaration, and thoſe in the Will, are the ſame; that afterwards, *viz.* 10 *Apr.* 20 *Car.* 2. *Nicholas* died ſeiſed without Iſſue of his Body; that after his Death, the ſaid *Simon* his Brother and Heir entred, and was ſeiſed in his Demeſne *ut de libero tenemento* for Term of his Life; Remainder to the firſt Son of the Body of the ſaid *Simon* the Brother, and the Heirs of the Body of ſuch firſt Son lawfully to be begotten; and for Default of ſuch, to the ſecond, *&c.* Remainder to Sir *Simon* in Tail, Remainder to the ſaid *Simon* the Brother and his Heirs.

That *Simon Leach* the Brother ſo being ſeized, afterwards, *viz.* 20 *Aug.* 20 *Car.* 2. took to Wife *Anne* the Daughter of *Unton Crook*; that afterwards the 20 *Aug.* 25 *Car.* 2. he being ſo ſeiſed did Make, Seal, and as his Deed Deliver a certain Writing, purporting a Surrender of the ſaid Lands to the ſaid Sir *Simon Leach*, which Writing was *prout*, *&c.* Then they find, that the ſaid *Simon Leach* the Brother *non fuit compos mentis ſuæ tempore confectionis, ſigillationis & deliberationis ſcripti illius*, *&c.* That afterwards, *viz.* 10 *Nov.* 25 *Car.* 2. the ſaid *Simon* the Brother had Iſſue of his Body, on the Body of the ſaid *Anne* his Wife, *Charles Leach*; that the ſaid *Simon* died, and *Charles Leach* the Leſſor of the Plaintiff is eldeſt Son and Heir of the ſaid *Simon*, *&c.* *Et ſi videbitur Cur' quod*, *&c.* Upon this Verdict there was Judgment for the Plaintiff.

And now it was argued, That the ſaid Judgment was Erroneous; and ſaid that in the Caſe there were two *Queries*. 1. If this were a good Surrender, there being no Acceptance or Agreement by Sir *Simon* before the Birth of the firſt Son *Charles*: But this was not inſiſted on before, and therefore waived here, the ſame having been adjudged by the Lords to be a good Surrender, even to an Infant without Acceptance, in another Action between the ſame Parties, which you may ſee reported in 2 *Ventris* 198, 208. Then it was argued on the ſecond *Query*, That the Leſſor of the Plaintiff in the Ejectment, being a Remainder-Man in Tail, cannot take any Advantage of his Father's Lunacy. That in this Caſe he could claim no Title as Heir at Law to his Father or Uncle, becauſe of the intermediate Remainder to the Defendant in Tail; ſo that *quoad* this Eſtate, he is as a mere Stranger, and not as Heir: And tho' he were able to avoid it by Writ, or the like, yet it being once good, the particular Eſtate of *Simon* the Father' of *Charles* was determined, before the Contingent Remainder to the firſt Son could take Place: And conſequently it can never after revive. Then the Queſtion is, Whether this Surrender by a *Non compos*, being an Act done by himſelf, and not by Attorney, be void or only voidable: There's no expreſs Caſe that a Surrender, by one who is *Non compos*, to him in Remainder, is void. Perhaps 'twill be ſaid, as it hath been, That the Acts of a Madman are mere Nullities by all Laws in the World. But to this 'tis an Anſwer, That the Laws of *England* have made good and honeſt Proviſions for them, ſo as to avoid their Acts for the Benefit of the Party, of the King and of the Heir. But it was repeated, that this was a Contingent Remainder, and if it could not veſt when the particular Eſtate did determine, whether by Death or Surrender, it never could veſt at all; for a future Right to defeat the Surrender, as Heir, cannot ſupport ſuch a Contingency. A preſent Right of Entry would; but if no ſuch preſent Right, the Remainder is gone for ever; and here was no ſuch in *Charles*. If Tenant for Life make a Feoffment with Condition of Re-entry, the Contingent Remainder ſhall never ariſe again, tho' the Condition be broken, and a Re-entry were made. So is the Caſe of *Purefoy* verſus *Rogers*, 2 *Saund.* 380. *Wigg* verſus *Villers*, 2 *Roll's Abridg.* 796. and then *Charles* cannot avoid this Deed; for the Avoiding of a Deed is to take ſomewhat out of the Way, in order to the Reveſting of ſomewhat: But here was nothing to work upon; for if the Surrender were good for a Moment, the particular Eſtate for Life was once gone, and conſequently for ever; and this muſt hold, unleſs the Act were totally void.

Argument for the Plaintiff in Error.

3 Lev. 284. 1 Show. 296.

Void or Voidable.

Then 'twas argued, That during the Life of the Party, 'twas only voidable for the King by Office; no Man can ſtultify himſelf; and ſo is the great Reſolution in *Beverly*'s Caſe, 4 *Rep.* and 1 *Inſt.* 247. and *Whittingham*'s Caſe, 8 *Rep.* and if it be not void as to himſelf, it cannot be void as to others. And tho' *Fitzh.* in his *N. B.* ſays that he himſelf may have a *dum non fuit compos*, that is not agreeable to the received Law; for *Beverly*'s Caſe was never

ſhaken

Reason why *Non compos* shall not stultify himself.

ſhaken till now; and *Fitzh.* ſuppoſes it only voidable, by ſaying that Writ doth lie. There is alſo a Reaſon for this Rule of Law, that a Man ſhall not diſable himſelf by Pretence of Diſtraction; becauſe if the Pretence were true, he had no Memory, and conſequently could not know or remember that he did ſuch an Act: And therefore 'tis, as it were, impoſſible for him to be able to ſay that he was ſo diſtracted when he did it: 'Tis for him to ſay what 'tis not poſſible for him to know. But they would compare this to the Caſe of an Infant; yet even there all his Acts are not void: His Bond is only avoidable; he cannot plead that 'tis not his Deed. 'Tis true, that Acts apparently to his Prejudice cannot be good, as 1 *Cro.* 502. Suppoſe a *Non compos* Signs, Seals and Delivers ſuch a Deed, and after recovers his Senſes, and agrees to it, would not this be a good Surrender from the firſt? *Perkins ſect.* 23. 1 *Inſt.* 2. and if it can be made good by a ſubſequent Agreement, 'twas not totally void, and if not totally void, 'tis with the Plaintiff in Error: The Law, beſides, is very tender in caſe of Freeholds, to make Conveyances void by bare Averments, and this would be of dangerous Conſequence, if when there was no Inquiſition or Commiſſion of Lunacy during Life, that thirty or forty Years after a Conveyance it ſhould be in the Power of a Stranger to ſay, that the Vendor was Mad. 'Twill make Purchaſors unſafe: Acts ſolemnly done ought to have a ſolemn Avoidance. The 1 *H.* 5. *cap.* 5. makes a Fine to be void; 'tis void as a Bar, but yet it makes a Diſcontinuance, and muſt be ſolemnly avoided. *Lincoln* College Caſe, 3 *Rep. Stroud* and *Marſhal*, 3 *Cro.* 398. *Dett ſur Oblig'* The Defendant pleads that at the Time he was of *none ſane Memory*, and on Demurrer adjudged no Plea; and the Opinion of *Fitzh.* held not to be Law. And 3 *Cro.* 622. 50 *Aſſiſ.* 2. *Fitzh. Iſſue*, 53. a Releaſe by a *Non compos*, which is much the ſame with a Surrender, only one works Upwards, and the other Downwards; and after Recovery the Party agrees to it, the ſame is binding, 39 *H.* 6. 42. and 49 *E.* 3. 13. Then was mentioned the Proviſion of the Law in theſe Caſes, beſides the Care of the Court of *Chancery*, which protects the weak and unwary by Rules of Equity. There's a Writ *de Ideota Inquirend'*, and the expreſs Direction of the Writ is to inquire *quas terras alienavit*, which ſhews that 'tis not void. The Statute of *Prærogativa Regis*, is expreſs Authority for it; the Reaſon given is, that ſuch Perſons Lands ſhould not be aliened to their Hurt, or the King's. It muſt be agreed, that before Office found the King cannot avoid the Alienation, even of an Ideot; and then after Office, the Practiſe is to Iſſue a *Scire facias* to him in Poſſeſſion, or to the Alienee; and ſo is *Fitzh.* tit. *Scire facias*, *pl.* 2. 106. All theſe Methods preſcribed by the Law would be uſeleſs, if the Acts themſelves were void: Then 'tis as certain, that the Office muſt be found during the Party's Life, and during the Inſanity, and not afterwards. If there had been an Office, 'twould only avoid it with a Proſpect, as it would be in caſe of an Heir after Death: Even after an Office, the King cannot have the Profits from the Time of the Alienation: Which

ſhews it not void from the Beginning. If a Suit be againſt an Ideot after Inquiſition, the Ideot cannot plead it, but the King ſhall ſend a *Superſedeas* to the Judges, ſuggeſting the Inquiſition; ſo that even then the Party himſelf cannot avoid it.

As to the other way of avoiding it by the Heir, it muſt be by Writ or Entry; and till Entry or Writ the Act remains good. But here's no Conteſt with the Party himſelf, or with his Heirs, but with a Remainder Man. This Act of Surrender was no tortious Act, it wrought no Diſcontinuance: There was no Truſt in him to preſerve the Contingent Remainder: A Feoffment with Livery is allowed not to be void, and yet that may do a Wrong by Diſcontinuance, *&c.* As to the Pretence that a Warrant of Attorney to make Livery is void, that doth not reach this Caſe; for here's an Act done by himſelf, which would have paſſed the Eſtate as by and from himſelf, if he had been of ſound Mind.

Then 'twas deſired that the other Side would ſhew any ſuch Caſe as this: Whereas Multitudes of Gifts, Grants, Releaſes, Bonds and other Specialties, ſealed and delivered by the Party himſelf, are allowed to be good. And the ſame Reaſon holds for a Surrender made in Perſon; and there's no Difference between a Livery made in Perſon and a Surrender; the Act being Perſonal, and not by another under his Authority, makes the Livery good; and ſo it ought to be here. 18 *E.* 4. 2. *Perkins, ſect.* 139. And 'tis obſervable in 39 *H.* 6. 42. *per Priſot*, upon the Inquiſition 'tis reſeiſed and reveſted into the Intereſt of the Ideot, and conſequently of the King: And if reveſted, 'twas once out of him. Now here's no Prejudice to the Man himſelf by this Opinion; he is taken Care of, and his Acts avoided by the King on his Behalf; and his Heirs may avoid them: But that Strangers ſhould take Notice of them as void, was denied; and therefore prayed that the Judgment ſhould be reverſed.

On the other Side it was argued with the Judgment, That this never was a Surrender; that 'twas againſt Senſe and Reaſon, to allow the Acts of a Madman, a Perſon diſtracted, to be valid to any Purpoſe. That in Caſe of Livery it had been allowed to be only voidable, by Reaſon of the Solemnity and Notoriety of the Thing: But in caſe of a Deed, or a Thing paſſing only by Deed, 'twas otherwiſe. And *Bracton*, *Britton*, *Fleta*, and the Regiſter were cited, where 'tis declared who can take, and who can alien, and that a Madman cannot alien; and *Fitzh.* is of Opinion, that the Writ of *dum non fuit compos* may be brought by himſelf. That there was a Notion ſcattered in the Books, that ſuch Acts are only voidable; but the Reaſon of the Law is otherwiſe. 39 *H.* 6. 42. hath the Diſtinction; that Feoffment with Livery is good, but if Livery be by Warrant of Attorney, 'tis void. If it be a Feoffment with Warranty by Deed, and Poſſeſſion delivered with his own Hands, yet the Warranty is void, becauſe the Deed is void. *Perk.* 5. The Deed of a Madman is void. If he grants a Rent, 'tis void. If an Infant makes a Warrant of Attorney, 'tis void; ſo is *Whittingham*'s Caſe. A Deed and a Will are not to be diſtinguiſhed; and by the ſame Reaſon that the one is void, the other is ſo. *Finch* 102. is gene-

Argument for the Defendant in Error.

ral; all Deeds of a Man of *non ſane memorie* are null: 12 *Rep. Shulter'* Caſe, 'Tis an Offence to procure a Deed from him. The Civil Law makes all his Acts, which he doth without Conſent of his Curator, to be void. A Madman is taken *pro abſente*. 'Tis a Rule unaccountable, That a Man ſhall not ſtultify himſelf; that he ſhall not be able to excuſe himſelf by the Viſitation of Heaven, when he may plead Dureſs from Men, to avoid his own Act. 'Tis abſurd to ſay, That a Deed procured from a Man in a Fever, or in *Bethlehem*, ſhall be valid to any Purpoſe. *Fitzherbert*, who was a good Lawyer, ridicules the Pretence, and maintains, That he himſelf may avoid ſuch Act. Then were cited 2 *Inſt.* 14. *Lloyd* and *Gregory*, 1 *Cro.* 501, 502. *Perkins*, tit. *Grant*, 13. Then it was ſaid, That in this Caſe there needs not much Argument, the Reaſon of the Thing expoſes the pretended Law. And the Judges have declared that this Surrender is void; the Word *amens* or *demens* imply that the Man hath no Mind, and conſequently could make no Conveyance. Wherefore it was prayed that the Judgment ſhould be affirmed; and without much Debate it was accordingly affirmed.

Judgment affirmed.

Henry Earl of Lincoln, by Suſanna Counteſs of Lincoln his Mother and Procheine Amye, Appellant, verſus *Samuel Roll, Eſq; Vere Booth, Hugh Forteſcue, Eſq; and Bridget his Wife & al', Reſpondents.*

Will revoked by ſubſequent Deed of the Teſtator, altering his Eſtate. For the Differences ſee 1 Vern. 97, 141, 182, 329, 342. 1 Salk. 158. 1 Rol. Abr. 616. Cro. Jac. 49. 2 Vern. 495, 720.

APPEAL from a Decree of Diſmiſſion in *Chancery*: The Caſe was thus; *Edward* late Earl of *Lincoln*, who was Son and Heir of *Edward* Lord *Clinton*, the only Son of *Theophilus* Earl of *Lincoln* deceaſed, being ſeiſed in Fee of the Manors of, *&c.* after his Mother's Deceaſe (who is yet living) and of other Lands of about 3000 *l. per Annum*, Part of the ancient Eſtate of the Family; and deſigning that, in Default of Iſſue Male by himſelf, his Eſtate ſhould go with the Honour, made his Will the 20 *Sept.* 34 *Car.* 2. and thereby deviſed the Premiſſes to Sir *Francis Clinton* for Life, Remainder to his firſt and other Sons in Tail Male, with many Remainders over to ſuch Perſons in Tail Male, to whom the Honour might deſcend; and directed that his Houſhold Goods at - - - - ſhould remain there as Heir-Looms, to be enjoyed by the next Heir Male, who ſhould be Earl of *Lincoln*, and made the ſaid Sir *Francis*, the Appellant's Father, and after his Death, Earl of *Lincoln*, Executor. On the 6th of *Nov.* 36 *Car.* 2. Earl *Edward* made another Will in Writing in like Manner, with the Alteration of ſome Perſonal Legacies; and afterwards in *April* 1686. and in *Dec.* 1690. did republiſh his Will. Then Earl *Ed-*

ward ſold Part to *Richard Wynne*, Eſq; for 24491 *l.* 3 *s.* 6. *d.* and mortgaged the Premiſſes in Queſtion to him for 12200 *l.* Then Earl *Edward* by Deed of Leaſe and Releaſe, dated the 27th and 28th of *April* 1691. conveys his whole Eſtate to the Reſpondents *Davenport* and *Townſend*, and their Heirs, to the Uſe of him and his Heirs, till his then intended Marriage ſhould take effect: And after ſuch Marriage had, then as to Part, in Truſt for his intended Wife and her Heirs and Aſſigns for ever: And as to the reſt, in Truſt to permit the ſaid Earl to receive the Profits during his Life; and after his Deceaſe, to ſell the ſame for the beſt Price, and out of the Money raiſed by Sale, to defray the Funeral Expences, and pay his Debts, and deliver the Surplus, as he ſhould (by his laſt Will and Teſtament in Writing, atteſted by three Witneſſes, or by another Deed in Writing ſo atteſted) appoint; and for want thereof to the Executors and Adminiſtrators of the Earl; with a Proviſo, That the ſaid Earl, by his laſt Will and Teſtament, or any other Deed in Writing (to be thereafter by him made and executed and atteſted as aforeſaid) might alter, change, determine, or make void all or any the Truſts aforeſaid; and for want of ſuch after to be made Will or Deed, then in Truſt for the ſaid Earl *Edward*, his Heirs and Aſſigns for ever. Earl *Edward* died without Iſſue of his Body, and without Marriage.

The Appellant exhibited a Bill to have the ſaid Deeds of Leaſe and Releaſe ſet aſide, and to have the Will executed. The Reſpondents, as Heirs, inſiſt upon the Deeds as a Revocation; and their Heirſhip was thus: *Theophilus* Earl had Iſſue *Edward*, *Katharine*, *Arabella* and *Margaret*; *Edward* died in the Life-time of *Theophilus*, leaving Iſſue *Edward* late Earl of *Lincoln*; *Katharine*, by Sir *George Booth*, had Iſſue the Reſpondent *Veer Booth*; *Arabella*, by *Robert Roll*, had Iſſue *Samuel Roll*; and *Margaret* married *Hugh Boſcowen*, and had Iſſue the Reſpondent *Bridget Forteſcue*. And the Court, aſſiſted with the two Chief Juſtices and Mr. Juſtice *Powel*, ſaw no Cauſe to relieve the Appellant.

Argument for the Appellant.

And now it was argued with the Appeal, That the Diſmiſſion was Erroneous, there being Cauſe for Relief: For that the Marriage never did take effect, nor any ſerious Overture or Treaty was made by the ſaid Earl on that behalf; ſo as the ſaid Earl did continue, and at the Time of his Death was ſeiſed of the ſame Eſtate in the Premiſſes he had at the Time of making and publiſhing the Will. That if at Law the Deeds of Leaſe and Releaſe were in Strictneſs a Revocation of the Will, yet in Equity they ought not to be conſtrued a Revocation of the ſaid Will, ſo often and ſo ſolemnly and deliberately made and publiſhed, and upon ſo good a Conſideration as the Support of the Honour. That the ſaid Will was the Reſult of the Earl's continued Intentions throughout his Life, and the Deeds were only the Effect of ſome ſudden Fancy or Paſſion; and even by thoſe Deeds no Benefit was deſigned to the Reſpondents; for the Diſpoſition of the Surplus of what ſhould

ſhould be raiſed by the Sale, was to be to his Executor Sir *F.C.* the Appellant's Father: And that did evidence a continued Kindneſs to him, who never had offended him, and no Regard to the Reſpondents, who (tho' they were his Heirs general) were related only at a Diſtance, and ſcarcely known by him; and very well provided for by great Portions raiſed out of the Eſtate for their Mothers.

Then 'twas argued, that this Eſtate was merely an equitable one; and conſequently Equity only ought to govern the Diſpoſition of it. Here's no expreſs Revocation pretended: That a Mortgage in Fee is no Revocation, for in Equity it doth not make the Eſtate another's. Here is a noble Peer, who is to ſit in the Seat or Place of his Anceſtors, and therefore no Preſumption, Intendment or forced Implication ought to be againſt him or his Intereſt. That this was deſigned to take effect, in caſe the Marriage was had, and not otherwiſe: That here was no Intention to revoke, but upon the Contingency of his Marriage. And there was cited *Zouch* and *Barker*'s Caſe 1625. in the Lord *Coventry*'s time, *Chan. Rep.* and the Lord *Boucher*'s Caſe in *Edward* the Sixth's Time; the Caſe was ſaid to be in *Dyer*, left as a *Quære*, and in 1 *Roll's Abridg.* And for theſe and many other Reaſons and Authorities urged, 'twas prayed that the Diſmiſſion ſhould be Reverſed and the Appellant relieved.

1 Chan Rep. 42.

Argument for the Reſpondents.

On the other Side 'twas inſiſted, That tho' this was not an expreſs Revocation by the Uſe of Words declaring it to be ſuch, yet 'twas a true, legal, and effectual Revocation; that theſe Deeds of Leaſe and Releaſe did alter the Eſtate; that here 'twas for Payment of Debts, as well as in Conſideration of the intended Marriage; that here was a manifeſt Change of his Intention; that both Will and Deed were voluntary and inconſiſtent, and therefore the latter muſt ſtand; that here were no Children or Creditors claiming under the Will; that tho' the ſubject Matter were an equitable Intereſt, yet Equity ought to follow the Rules of Law; that the Law made this a good Revocation, and Equity ought to judge it the ſame Way, unleſs Fraud were proved to be uſed in the procuring of the Execution of theſe Deeds. That the Reaſon why a Mortgage even in Fee, is not a Revocation, is becauſe a Mortgage doth carry upon the Face of it a Defeaſance; 'tis not reckoned an Inheritance to the Heir of the Mortgagee, but ſhall be Perſonal Eſtate, and Aſſets to pay the Mortgagee's Debts. This Deed was revocable by an after Will; which ſhews the Party to have no Regard for any former Will: Nor is there any Reference to the Will then in Being. If a Marriage had happened, 'twould be agreed to have been a Revocation; and if ſo, when was the Will revoked by that Act? By the Deed, or by the Marriage? Then it was ſaid that it certainly would have been revoked by the Deed; and conſequently ought to be conſtrued a Revocation, tho' no Marriage did enſue. Revocations are the ſame in Equity as at Law; and ſo it was held in the Caſe of the Earls of *Bath* and

Mountague. The Statute of Frauds never was thought to extend to ſuch Revocations as theſe. Tho' Earl *Edward's* Intentions were once to ſupport the Honour with the Eſtate; yet it was always in his Power to alter it. The Leaſe and Releaſe paſſed the Equity of Redemption; and conſequently 'tis the ſame now between the Appellant and Reſpondents, as if there had been no Mortgage in the Caſe.

'Twas further urged, That a Will is but an imperfect Conveyance, inchoate only, and ambulatory (as the Books term it) till the Death of the Party; and another Will may revoke it: And with greater Reaſon may a Deed, which alters the Eſtate, and ſhews a Change of the Intention of the Perſon who was Owner of it. There's no need of a Conſideration to warrant the Revocation of a Will; there needs no Reaſon to be given for it; 'tis only the Mind of the Party which both makes and revokes the Will. A Will is only the Signification of a Man's Purpoſe, how his Eſtate ſhall go after his Death: And tho' it be ſolemnly made in Writing, ſigned, publiſhed and atteſted; yet if he do any intermediate Act, whereby it muſt be neceſſarily inferred, that ſuch Purpoſe and Intention of his did not continue, the Conſequent muſt be, that what was done before, as to ſuch Will, is totally defeated; and unleſs it be ſet up anew by a Republication, 'tis as no Will. The Caſe of *Mountague* and *Jeffryes*, 1 *Roll's Abridg.* 615. and *Moore* 429. proves this. If Conveyance at Law ſhews an Intent different from the Will as to Lands, 'twill be a Revocation, tho' ſuch Conveyance be not perfect to all Purpoſes. *Hodgkinſon* verſus *Wood*, *Cro. Car.* 23. 'Tis a Revocation, tho' the Owner ſhould be in again, as of his old Reverſion. The Caſe of *Leſtrange* and *Temple* 14 *Car.* 2. reported in *Sid.* 90. 1 *Keble* 357. is ſtronger; but this is ſtronger yet: Becauſe 'tis not to the old Uſe, but limited in a different Manner. 'Tis a qualified Fee, and to be determined upon the Qualifications taking effect, and ſo cannot be the old Eſtate. And if it were, yet 'tis a Revocation; and there's no Circumſtance in the Caſe, that can direct a Court of Equity to differ from the Law. And therefore it was prayed, that the Decree of Diſmiſſion might be affirmed; and it was affirmed. Decree affirmed.

John Fox Gen', Plaintiff, verſus *Simon Harcourt Arm', Defendant.*

Clerk of the Peace, his Office, by whom appointed, and removed. 1 Show. 426, 506, 516. 4 Mod. 167. See Carth. 426. Saunders v. Owen.

WRIT of Error on a Judgment in *B. R.* The Caſe was upon a ſpecial Verdict, in an Action of the Caſe upon an *Indebitatus Aſſumpſit* for Monies received to the Plaintiff's Uſe, brought there by *Harcourt* verſus *Fox*, which Verdict finds the 37 *H.* 8. *cap.* 1. intitled, a Bill for *Cuſtos Rotulorum* and Clerkſhip of the Peace. Then they find the 1 *W. & Ma.* intitled, An Act for enabling Lords Commiſſioners for the Great Seal to execute the Office of Lord Chancellor or Lord Keeper, and ſeveral Clauſes therein concerning this Matter. Then they find that *John* Earl of *Clare* was by Letters Patent, dated the 9th Day of *July Anno* 1 *W. & Ma.* according to the 37 *H.* 8. made *Cuſtos Rotulorum* for the County of *Middleſex*, and ſet forth the Letters Patent *in hæc verba.* Then they find that the Office of Clerk of the Peace for this County being void, the Earl of *Clare* by writing under his Hand and Seal, dated 19 *July Anno primo*, did nominate, appoint, and conſtitute the Plaintiff, Mr. *Harcourt*, to be Clerk of the Peace for *Middleſex* for ſo long Time only as he ſhould well demean himſelf therein; and the Inſtrument was found *in hæc verba.* Then they find him to be a Perſon reſident in the County, capable and ſufficient to have and execute the Office; that he took upon him the Execution of the ſaid Office; and before he did ſo, he at the Quarter-Seſſions for the ſaid County, in open Seſſions, took the Oath required by the late Act of this King, and the Oath of Clerk of the Peace, and did do and perform all Things neceſſary to make him a compleat Officer; and that during all the Time he did execute the ſaid Office he demeaned himſelf well.

Then 'tis found, that on the fifth of *February Anno tertio*, the ſaid Earl of *Clare* was in due Manner removed from being *Cuſtos*; and *William* Earl of *Bedford*, by Letters Patent dated the ſixth of *Febr.* was made *Cuſtos* according to the 37 *H.* 8. and thoſe Letters Patent are alſo found *in hæc verba.* Then they find an Appointment in Writing, dated the fifteenth of *February* by the ſaid Earl, of the ſaid *Fox* to be Clerk of the Peace for the ſaid County; to hold the ſaid Office for and during the Time the Earl ſhould enjoy and exerciſe the ſaid Office of *Cuſtos*, ſo as he well demean himſelf therein. They likewiſe find *Fox* to be a Perſon capable, *&c.* and that he took the Oath, and did the other Things requiſite to qualify himſelf for the ſaid Office; that he did thereupon enter on the Execution of the ſaid Office; and during the Time that he executed it, he well demeaned himſelf therein, and did take the Fees belonging to the ſaid Office, which they found

to be to the Value of five Shillings ; *Sed utrum, &c. Et ſi, &c. Et ſi, &c.* Upon this Judgment was given for the Plaintiff below.

And it was now argued for the Plaintiff in the Writ of Error, That this Judgment ought to be reverſed. And firſt it was ſaid, that whatſoever the Common Law was, as to ancient Offices, could be no Rule in this Matter: Many and moſt of thoſe were for Life; but my Lord *Coke* ſays, That the Office of Chancellor of *England* could not be granted to any one for Life; becauſe it was never ſo granted. The like of Treaſurer: So that Cuſtom, and nothing elſe, can govern in thoſe Offices. But here can be no Pretence of its being a Common Law Office; for the Common Law knew no ſuch Thing as Juſtices of the Peace, to whom, they ſay, he is a Clerk. That the firſt Statute which makes Juſtices, hath no Mention of Clerk; but it was merely an Incident; ſome Perſon of Neceſſity was to officiate in that Kind: And where he is called the Juſtices Clerk, it can only be, that he was one appointed by them to make and write their Records for them; and 'tis probable that in ancient Time, he that was their Clerk was *Cuſtos Rotulorum*, and intruſted with the keeping of the Records. Then it coming to be an honorary Thing to be *Cuſtos*, he that was the moſt eminent for Quality amongſt them, was appointed to that Truſt; and then he appointed his Clerk under him: For there's no ancient Statute or Law, that impowered the Chancellor to make a *Cuſtos*; but he making out the Commiſſion of the Peace, might very well name one of them to be Keeper of the Records, and to have the firſt Place amongſt them. And ſuch Perſon might very well appoint his Deputy or Servant, who in Time came to be Clerk of the Peace. We have no certain, but this is the moſt probable, Account of the Thing.

Argument for the Plaintiff in Error.

Origin of the Office of Clerk of the Peace,

and of *Cuſtos Rotulorum.*

Then the Statute of 37 *H.* 8. recites, That the Chancellor had much perverted the Inſtitution, by aſſuming to make *Cuſtos's* for Life, and ſo the Clerks of the Peace were for Life likewiſe. The End of that Act was not only to remove ignorant Perſons; for the Common Law it ſelf would turn any ſuch out of Office, if he be not able to perform the Duty of it; but the Grants for Life, were the great Grievance: And therefore to remedy that Miſchief the *Cuſtos* muſt be appointed by Bill ſigned with the King's own Hand, and at his Pleaſure removeable; and the Clerk of the Peace to be appointed by the *Cuſtos*, and to continue only during the Time of the others continuing to be *Cuſtos*. This (tho' not in the Negative) doth amount to it, *viz.* that he ſhall continue no longer: Eſpecially when the Act recites the Miſchief to be a Continuance during Life; it implies that the Clerkſhip of the Peace ſhould be never granted, for a longer Intereſt, than the *Cuſtos* had in his Office. The 3 & 4 *E.* 6. doth indeed repeal Part of the 37 *H.* 8. not by expreſs Words, but by a very ſtrong Implication, by giving the Chancellor a Power to nominate the *Cuſtos*: But the Office of Clerk of the Peace is not toucht by that

of

of *E.* 6. and continues as ſettled by 37 *H.* 8. which is during the Continuance of the *Cuſtos*.

Then 'tis the new Statute, which gives the Occaſion of the preſent Diſpute; and there's nothing in this Act, which can make ſuch an Alteration in the Law, as was below contended for. The Words, *So long only as he ſhall well demean himſelf*, are not enlarging of his Eſtate, but Reſtrictive: And whenſoever 'tis conſidered how to make a Grant for Life to be good, you muſt conſider the Power and Capacity of the Grantor, and how the Thing is capable of being ſo granted: As in Caſe of Tenant in Tail, or Fee, and each makes a Leaſe for Life; in the latter Caſe, 'tis for the Life of the Leſſee: And in the former, for the Life of the Tenant in Tail, becauſe of the different Capacities of the Grantors: And ſo the Thing it ſelf is conſiderable. Here's an expreſs Statute, that ſaith it ſhall be only during the Continuance of the *Cuſtos*; now that Proviſion is to be purſued. 'Tis ſaid, that a Grant *quam diu ſe bene geſſerit*, is for Life; but the Words themſelves do not import any ſuch Thing: 'Tis indeed a reſtrictive Condition which the Law impoſes upon all Offices; for Misbehaviour in any Office, if in Fee, is a Forfeiture: But the chiefeſt Conſideration is, if it be an Office that is capable of being granted for Life. If it be ſo, theſe Words may amount to a grant for Life, as expounded by Uſage and the Nature or Capacity of the Office it ſelf; but otherwiſe, if the Office be not grantable for Life, ſuch Words will not give an Eſtate for Life: Theſe Words ſeem only to be an Expreſſion of what the Law always implieth, tho' not particularly expreſſed. If it operate any Thing, it ſeems only to have Reference to the Power of the Grantor, as a Reſtriction on him; and not as an Enlargement of the Eſtate of the Grantee: Eſpecially where by a Law in Being, there's an Incapacity upon the very Office not to be granted for Life.

Then it was urged that the Statute of 37 *H.* 8. was not repealed: The 3 & 4 *E.* 6. doth not alter this Matter at all; and where it did make any Alteration, the ſame is expreſly repealed by this laſt Act in Queſtion. It is a ſettled Rule, that if there be two Statutes, and both conſiſtent and not contradictory, the latter can never be ſaid to repeal the former; and ſo is Dr. *Foſter*'s Caſe 11 *Rep.* 5, 6. ſo it is in Wills, *Hodgkinſon* and *Wood*, *Cro. Car.* 23. This laſt Act of *W.* & *M.* is conſiſtent with the 37 *H.* 8. the one ſays, He ſhall continue during the Time that the *Cuſtos* doth remain ſuch, ſo as he demean himſelf well: The other ſays, He ſhall enjoy his Place, ſo long only as he demeans himſelf well in it. Now take the Office to be by the 37 *H.* 8. only grantable to hold during the Continuance of the *Cuſtos*, then ſuppoſe in the ſame Act, it ſhould be ſaid to hold ſo long only as he demean himſelf well; where is the Inconſiſtency or Contradiction? And if none, then this laſt Act doth not Repeal the former as to this Matter. And Mr. *Fox*'s Grant is purſuant to the Statute of *H.* 8. and Mr. *Harcourt*'s hath no Relation to it.

Then 'twas argued, That 'twas unreaſonable that a *Cuſtos* ſhould have an Officer under him of another's Choice, when himſelf is reſponſible for the Records which ſuch Officer is concerned with. The primary Intent of this laſt Act was only to ſettle the Doubts about the Keepers of the Great Seal: Not to alter the Eſtate of the Office of Clerk of the Peace. The Offices of the Judges in *Weſtminſter-hall* determine with the King's Life who grants them, tho' they are granted to hold during good Behaviour. In this Act, the Reaſon of uſing theſe Words was for Caution, to advertiſe them that Misbehaviour ſhould forfeit their Places. If an Alteration of the Law had been intended, they would have ſaid for Life, ſo as he demean himſelf well, eſpecially when (as was ſaid before) he was removeable for Misbehaviour by the former Laws in Being. Wherefore upon the whole Matter it was prayed that Judgment might be reverſed.

Argument for the Defendant in Error.

On the other Side it was argued with the Judgment, That 'tis clear and apparent that this Act of *W. & M.* was made only to ſatisfy Doubts, and prevent Queſtions about the Office for the Cuſtody of the Great Seal, but to ſettle the Manner of naming the *Cuſtos* and Clerk of the Peace. And that 'tis in Part introductive of a new Law; and in part a Revivor of the old: But the general End was, that the Office of Clerk ſhould be filled and executed by a learned, able, honeſt Perſon; becauſe it concerns the Adminiſtration of Juſtice. He is the King's Attorney in many Reſpects; he not only writes the Senſe of the Juſtices in their Orders; but draws Indictments, and upon Traverſes he joins Iſſue, as one *qui pro Domino Rege in ea parte ſequitur*, and prays Judgment for the King in many Caſes; joins in Demurrer, when Occaſion requires, and is, in the Seſſions, the ſame as the Clerk of the Crown is in the *King's Bench*. Now to accompliſh this End of having a Perſon well qualified, and to encourage and oblige him to his good Behaviour, it requires a Reſidence in the County; it enjoins that the Perſon named be able; it ſubjects him to the Juriſdiction of the Juſtices, who have a daily Obſervance of his Demeanour; it gives them a Power to remove him upon a juſt Complaint, which they could not before; it frees him from the uſual Temptation to Fraud and Corruption, by introducing him *gratis & ſine pretio*; and to provoke his Care and Diligence, it gives him a more durable Eſtate in his Office, than he had before, when he bought it, *viz.* Freehold, an Eſtate for his Life. That it ſhould be ſo, is convenient; becauſe, then he will be encouraged to endeavour the Increaſe of his Knowledge in that Employment, which he may enjoy during Life: Whereas precarious dependant Intereſts in Places tempt Men to the contrary.

That this is an Eſtate for Life, appears from the Words of the Act; they do direct how long he ſhall enjoy his Office; ſo long only as he ſhall behave himſelf well. If the Word *only* had been omitted, there could be no Colour for a Doubt. By 1 *Inſt.* 42. 'Tis an Eſtate for Life, determinable upon Misbehaviour; for during

good Behaviour is during Life; 'tis ſo long as he doth behave himſelf well; *i. e.* If he behaves himſelf well in it ſo long as he lives, he is to have it ſo long as he lives; during Life, and during good Demeanour, are therefore ſynonymous Phraſes, the ſame Thing when uſed with relation to Offices; the Condition annexed, if obſerved, continues it during Life, the contrary determines it. This is the Rule and Law in caſe of Offices in general, and muſt hold in this: For this is an Office, 2 *H.* 7. 1. He is called *Att' Domini Regis*. 'Tis capable of being enjoyed for Life; and conſequently of being granted ſo; eſpecially when an Act of Parliament declares it ſhall be ſo. There's nothing in the Nature of the Employment that hinders it; and there can be no Doubt, but that a Statute may impower a *Cuſtos* in Poſſeſſion, who hath only an Eſtate at will, to name a Clerk to hold during Life or good Behaviour. The Juſtices are at Pleaſure; ſuppoſe then the Act had ſaid, That they ſhould name him in this Manner; he muſt have continued, tho' they had died, or had been removed. The Caſe is the ſame here; he is as much intruſted with the Acts of the Juſtices, as with the Records belonging to the keeping of the *Cuſtos*. Then there's nothing in the Act that favours of an Intention to make him dependent on the *Cuſtos*'s Office: The *Cuſtos* is to name him, but the Juſtices have the Control over him; he is an Officer to the Seſſions, and the Juſtices only can remove him. The Limitation of the Intereſt of the *Cuſtos* in his Office, and that of the Clerk, are different; and that ſhews, that the Duration of the one was not to depend on the other. Beſides, the *Cuſtos* is to name, not when he ſhall be made *Cuſtos* (as it would have been worded, if the Intention advanced on the other Side had been true) but whenſoever it ſhall be void. It doth not ſay, every new *Cuſtos* ſhall; or that every *Cuſtos* ſhall name: But generally when 'tis void, he ſhall, *&c.*

Objections anſwered.

Then as to the Objection, That this new Act is conſiſtent with the 37 *H.* 8. and therefore that is ſtill in Force: 'Twas anſwered, That by the former Act he was intirely placed under the *Cuſtos* who had Power to diſplace him upon Miſcarriage. The Seſſions then could not do it, tho' a Court, and a Court of Record: They might ſuſpend him, but could not deprive him of his Office, even for ill Demeanour: This was that Act. Now the preſent Law abridges the Power of the *Cuſtos*: He muſt name a Reſident; before he might appoint any able Perſon: The Perſon was then removeable by the *Cuſtos*; now only by the Juſtices. Care is taken, that nothing is to be given for the Office, and now he may make a Deputy without the Approbation of the *Cuſtos*. Here's plainly a different Juriſdiction over him, and a different Eſtate veſted in him: This expreſs Limitation of the Intereſt to him is an Excluſion of the former Eſtate, as dependant upon that of the *Cuſtos*. And beſides, this is a Subſtantive diſtinct enacting Clauſe of it ſelf, and no ways relating to the Statute of *H.* 8. Why was this Limitation penned differently from that, unleſs to give another Sort of Intereſt? As to the Caſes of new Laws which

repeal former, 'twas ſaid, That the Rule was certain, that whatſoever Statute is introductive of a new Law, tho' penned in the Affirmative, is a Repeal of the former, as implying a Negative; *i. e.* the latter ought to be obſerved, if it concerns the ſame Matter. The Statute of *E.* 6. controlled the Statute of *H.* 8. One directed the Keeper to name, the other the King, and both are in the Affirmative; yet the latter muſt be obſerved. And if this be a new Eſtate (as it hath been adjudged below) then the Party ought to enjoy it. And for this was cited 1 *Sid.* 55. *Plowd.* 113. and other Books.

Then 'twas ſaid, That the Clerk of the Peace, named by the Juſtices, in Default of the *Cuſtos*, would have an Eſtate for Life; and by the ſame Reaſon it ought to be ſo here: Tho' the *Cuſtos* be to be named according to the Statute of *H.* 8. yet he is not to execute his Power of *Cuſtos* according to that Act; but is tied to a Reſident, hath not the Approbation of a Deputy, and cannot remove. By the Statute of *H.* 8. the Clerk had but an Eſtate at the Will of the King, the *Cuſtos* having no other; this is ſo long as he doth well in his Office. Theſe are different; and when the *Cuſtos* hath named him, he is in by the Statute. If what they on the other Side contend for had been intended, there was no need of theſe Words of Limitation at all; and the Words, *in like manner as by the former Act*, had fulfilled the Intention, if ſuch had been.

As to the Word *only*, that would make no Alteration in the Caſe of any other Office. Suppoſe an Office granted to a Man *quamdiu tantum*, or *ſolummodo*, *ſe bene geſſerit*, would that give leſs than an Eſtate for Life? The Word *only* was added, not to Abridge the Eſtate of the Clerk; but rather to reſtrain the Power of the *Cuſtos*, that he ſhould have Authority only to limit it during good Behaviour, and not for a leſs Intereſt or Eſtate: The *Cuſtos* is confined, that he ſhall not grant it for Years, or at Pleaſure. Beſides, *only* is but juſt ſo long, and no longer, or ſo long as; and 'tis the ſame Thing with the Word, as without it. *Dummodo ſola vixerit*, is during all her Widowhood. Suppoſe a Power to make Leaſes to hold only for and during the Term of 21 Years, the ſame would be good for the whole Term. Then 'tis no Objection, That the Eſtate of the Clerk is greater than his is who names him, for that may be by Cuſtom, as in the Offices in *Weſtminſter-hall*, *Hobart* 153. and the Clerks of Aſſiſe, where Uſage fixes the Eſtate. And the like in Caſe of Power to make Leaſes upon Family Settlements to Uſes, where Tenant for Life grants larger Intereſts than his own: 'Tis true, the Powers and Eſtates raiſed by them iſſue out of the Inheritance; but the Tenant for Life only names them: As the *Cuſtos* doth here, tho' the Statute gives the Intereſt.

As to the Inconvenience, That dependent Offices ſhould continue againſt the Will of their Superiours, that can be no Objection; ſince there are few great Officers in the Realm, but have many Subſtitutes and Inferiors under them, which were named by

by their Predeceſſors, and are not removable. Almoſt every Biſhop in *England* is under theſe Circumſtances, with reſpect to the Regiſter of his own Court, who notes and records his Acts, *&c.* This is an Exception to all Grants for Lives. But Credit ought to be given to the Honour, Wiſdom, and Judgment of former, as well as preſent Officers, in reſpect of ſuch Nominations, 'till ſome Misbehaviour ſhews the Choice to have been ill; and when that appears, the Perſons are removable, and then the Inconvenience is likewiſe removed. Here the Jury have found the Plaintiff in the Action below to be able and ſufficient, and well qualified for the Office, and to have done his Duty in the Office, while he had it. Wherefore it was prayed that the Judgment might be affirmed; and it was affirmed.

Judgment.

Henry Lord Biſhop of London, *and Peter Birch, D. D. Plaintiffs,* verſus *Attorney General pro Domino Rege & Regina.*

The Prerogative of the Crown in preſenting to Benefices where it promoted the laſt Incumbent.
Salk. 540.
3 Lev. 377, 382.
4 Mod. 190, 200.
1 Show. 413, 493.

WRIT of Error to Reverſe a Judgment given in *B. R.* in a *Quare Impedit.* The Caſe upon Record was thus: The Declaration ſets forth the Act of Parliament, which Erects and Conſtitutes the Pariſh of St. *James* within the Liberty of *Weſtminſter*, out of the Pariſh of St. *Martin*, *&c. prout*, that by Force and Virtue of that Act, the ſaid Pariſh was made, and the Diſtrict therein named became a Pariſh, and Dr. *Tenniſon* Rector of the ſame; that he was afterwards *Rite & Canonice conſecratus Epiſcopus Lincoln'*, and that thereby the ſaid Church became void, and thereupon it belonged to the King and Queen to preſent a fit Perſon *ratione Prærogative ſuæ Regiæ Coronæ ſuæ* Angl' *annex'*, and that the Defendants hindred, *&c.*

The Defendants crave *Oyer* of the Writ, and it is general; *Vic' Com' Midd' ſalut'. Præcip'* Henric' *Epiſcopo* Lond' & Petro Birch *Sacræ Theologiæ Profeſſori quod juſte & ſine Dilatione permittant nos præſentare idoneam perſonam ad &c. quæ vacat & ad noſtram ſpectat donationem, & unde præd' Epiſcopus &* Petrus *nos injuſte, &c.* And then they pray Judgment of the Writ and Declaration, becauſe that between the Writ and Declaration, there is a material Variance *in hoc, viz. quod ubi per Breve præd' præd' Dom' Rex & Regina intitulant ſe ad Donationem præd', &c. pleno Jure, tamen per Narr' præd' iidem Dominus Rex & Domina Regina intitulant ſe ad, &c. ratione Prærogativæ ſuæ Regiæ Coronæ ſuæ* Angliæ *annex' Unde pro variatione præd' inter Breve & Narr' præd'* they pray Judgment of the Writ and Declaration aforeſaid, and that the ſaid Writ may be quaſhed, *&c.* The Attorney General Demurs, and the Defendants join; and there's Judgment to anſwer over.

Then the Biſhop Demurs generally, and Mr. Attorney joins, and Dr. *Birch* pleads that he is Incumbent, and then ſets forth the Statute of *H.* 8. concerning Diſpenſations; and that after Dr. *Tenniſon* was elected Biſhop, the Archbiſhop granted to him a *Commendam Retinere*, with Power to take and enjoy the Profits to his own Uſe, by the Space of ſeven Months.

That this *Commendam* was confirmed under the Great Seal, according to the Statute; and the ſaid Dr. *Tenniſon* did enjoy the ſame accordingly, *&c.* Mr. Attorney Demurs, and Dr. *Birch* joins in Demurrer; and Judgment was given for the King, *&c.*

Argument for the Plaintiff in Error.

Variance between the Writ and the Declaration, where fatal or not.

And now it was argued in the firſt place, That the Plea in Abatement was good; and if ſo, all that followed was Erroneous. And to make that Plea good, it was ſaid that there is a Variance between the Writ and Declaration; that they are founded upon ſeveral Rights; that upon arguing the Merits of the Cauſe, it muſt be owned to be ſo, on the other Side.

That no Argument can be urged to maintain the Declaration in general, but the *Jure Prærogativæ*, and conſequently it muſt be different from the Title or Intereſt *pleno Jure.*

They have ſaid below that tho' the King's Intereſt is bound by Statutes, yet his Prerogative is not. This Diſtinction of the Rights muſt be allowed, or elſe the main Judgment is not juſtifiable; and that there is ſuch a Diſtinction, appears in *Gaudy* and the Archbiſhop of *Canterbury*'s Caſe in *Hob.* 302. by the Preſentation there recited, which was drawn by the King's Counſel; 'tis *ad noſtram Præſentation' pertinet, ſive ex pleno Jure, ſive ratione Prærogativæ.*

By *Bracton* 415. If the Writ be founded on one Right, and the Declaration on another, the Writ muſt be abated, as in Caſe of Executors and Corporations. In ſome Caſes it muſt be agreed, That the Writ may be general, and the Count Special; but none of thoſe Caſes will reach to this, where ſeveral Rights are pretended. 'Tis no Objection to ſay, That there is no Writ in the Regiſter for this; for that's rather an Argument againſt their Prerogative: Beſides, this Prerogative was never allowed till *Dyer*'s Time; and in the old Books 'tis denied, where the King was not Patron.

In the *Regiſter* 30. is a Writ Special, *quod permittant nos præſentare idoneam perſonam ad Eccleſiam de, &c. quæ vacat & ad noſtram ſpectat Donationem ratione Archiepiſcopatus* Cant' *nuper vacantis in manu exiſtentis.* And another *Sine titulo ut de jure*, and that is General, *ad noſtram ſpectat Donationem.* Another Writ is there *Ratione cuſtodiæ terræ & hæredis* upon a Tenure *in capite.* And another, *Ratione forisfacturæ unius, & ratione cuſtodiæ terræ & hæredis alterius per ſervitium.* Another Writ *pro Domino Rege & aliis conjunctim. Regiſter* 32. is another ſuch by Reaſon of the Vacancy of the Archbiſhoprick.

'Tis not an Anſwer, That the Writ of Waſte is General, and the Count Special, becauſe that is not *en auter droit*.

Then it was ſaid that it is true, That where another Writ cannot be had, a General Writ and Special Count are allowable; but here a Special Writ might have been ſued. And there were cited the 1 *Inſt.* 26, 53, 54, 235, 344. 3 *Cro.* 185, 829. And as to the Queen and the Archbiſhop of *York*'s Caſe 3 *Cro.* 340. that doth not come up to this Caſe; for tho' the Writ were General, and the Count in Right of the Duchy of *Lancaſter*, yet both were as Patron *pleno jure*; and the Count did only ſhew, how the Plaintiff came to be Patron; but here they were ſeveral Rights, as diſtinct, as a Claim by a Man ſingly, and a Claim as Executor, or *in jure Uxoris*.

In Anſwer to this were cited the Precedents in *Mich.* 31 *H.* 6. *Rot.* 65. *Paſch.* 9 *Eliz. Rot.* 1408 or 1410. *Hill.* 13 *Car.* 1. *Rot.* 486. *Trin.* 31 *Car.* 2. *Dominus Rex* verſus *Epiſcop' de Worceſter*, Writ General and Count Special. *Raſtal* 528, 530.

Merits of the Caſe. Then it was argued, upon the Merits of the Cauſe, as it was appearing upon the Declaration and Plea and Demurrer: And therein three *Queries* were made, as had been by the King's Counſel below.

Three Points. 1. If the King hath any Prerogative to preſent upon an Avoidance by Promotion, where neither himſelf, nor the Biſhop, was Patron, but another Subject.

2. If this *Commendam Retinere*, and to take the Profits to his own Uſe, was not a Service of this Prerogative Turn.

3. Suppoſing that there be ſuch a Prerogative, and that the *Commendam* makes no Alteration in the Caſe, then if this Vacancy of this Church be ſubject to this Prerogative.

1. Whether the Crown has ſuch Prerogative. As to the firſt it was argued, That where an Incumbent is promoted to the Order and Degree of a Biſhop, his Living or Benefice becomes void; and that where a Biſhop is Patron, and the Advowſon and Biſhoprick are become void at a Time, there the King ſhall preſent; becauſe while the Temporalties are in his Hands, he is lawful Patron for that Time, and conſequently had a Right to preſent, but not by Virtue of any Special Prerogative; but only as a Temporary qualified Patron, like as a *Dominus pro Tempore* of a Manor may do Acts of Neceſſity which regularly belong to the very true Lord himſelf. And this perhaps gave the Colour for this pretended Prerogative; and in Truth it anſwers every Thing, that can be ſuggeſted from any ancient Authority, whether Precedent, Book Caſe, or Opinion. It is otherwiſe where a Subject is Patron, and the King hath no Poſſeſſion of, or a Right to, the Patronage at that Time; in ſuch Caſe he cannot preſent; and there is no Prerogative given by our Law, to warrant ſuch a Right to that Preſentation.

All Prerogatives are founded upon ſome Reaſon of Benefit to the People, either in reſpect of the Government in general, or elſe of ſome particular Subjects: But this hath neither. And in 3 *Cro.* 527. 'tis agreed, that there is no Reaſon for ſuch a Prerogative; but 'tis added, and the Addition is ſomewhat ſtrange, that many Prerogatives have no Reaſon in them, or for them; and that 'tis unmannerly to inquire or doubt, if they are Reaſonable; whereas it might be thought that Unreaſonableneſs in the Matter contended for, had been an Argument againſt any Thing but an Act of Parliament.

The Reaſon and Foundation of the Prerogatives of the Crown.

In *Dyer* 228. Sir *Henry Sidney*'s Caſe *verſus* the Biſhop of *Glouceſter*, by *Dyer* 'twas agreed, That the Queen had no ſuch Prerogative; and he adds, *quod ſic alii Socii mei ſentiebant*; ſo that 'twas not his ſingle Opinion againſt it, but the whole Court of *C. B.*

Then 'twas ſaid, that the ancient Law knew nothing of this Prerogative. All the Records, Law Books, and even Hiſtories have been ſearched for the Maintenance of it, and no Footſteps can be found for it. No *Bracton* or *Fleta*, no *Doctor and Student* or *Stamf.* that treats of the *Prerogative*, hath any Thing of it. Now all Prerogatives are or muſt be Time out of Mind, or not at all: And then, if this be not ſo, it muſt be an Uſurpation; and being not Time out of Mind, it cannot be a Prerogative, becauſe not Part of the Common Law.

This here claimed not ancient.

In the great Caſe, which they ſo much inſiſt on, of *Woodley* in 2 *Cro.* 691. Juſtice *Hutton*, who was an ingenious Man, a good Lawyer, and a true *Engliſh* Judge, that argued againſt Shipmoney, he expreſly denies, that there was any ſuch Prerogative; that the King had no Title to preſent, but where himſelf is Patron; and that there was no ſuch Preſentment till of late Days; nor any Book of Law to warrant it, but that Caſe which is in *Bro. Abr. Preſentment al Eſgliſe*, 61.

Then 'twas urged, That a few Years Practiſe can no more make a Prerogative, than it can Repeal an Act of Parliament. 'Tis true, that in the Report of that Caſe, *Crook* ſeems to admit, that *Winch* was of Opinion for the Prerogative, and only *Hutton* againſt it: For he makes *Winch* to ſay, That the King has an Abſolute Title by his Prerogative, as well in the Caſe of Common Perſons Patronage, as where himſelf is ſo: But as 'tis in *Winch*'s Reports 96. where the Caſe is reported again, there they are both of Opinion againſt it; and *Winch* ridiculed the Opinion of *Bro. Preſentment*, 61. as the Saying of the Biſhop of *Ely*, who was then Chancellor, and might have Right to preſent to it by Force of his Place, if the King had ſuch a Prerogative: And indeed *Bro.* himſelf makes a Remark upon it, as a Thing never heard of before, by a *Quod nota.*

The King hath preſented to *Livings* of other Mens Patronages; but that was not by Force of this Prerogative; but on other Grounds, as 40 *E.* 3. 40. the King preſented to a Prebendary, when the Prebend was made a Biſhop: And the Reaſon of that Caſe makes for the Plaintiff in Error, *i. e.* becauſe the Temporalties of the

the Biſhop, who was Patron of that Prebendary, was then in the King's Hands, and then the King was Patron ſo long, and he did preſent as ſuch: So is the 41 *E.* 3. 5. the ſame as Patron having the Temporalties in his Hand: So is 44 *E.* 3. 24. upon another Reaſon; a Parſon is made a Biſhop, and the King preſented not *Jure Prærogativæ*, but becauſe that the Patron was the King's Tenant *in Capite*, and the Heir was in Ward to the King, and ſo he had *Jus Patronatus* in him: The King hath it, where he has the Temporalties; ſo is *Fitzh. Grand Abridgment*, Title *Quare Impedit*, *pl.* 35. the King claimed Title to preſent to the Provoſtry of *Wells* in the Gift of the Biſhop, void upon the Provoſt's being made Dean, becauſe the Temporalties of the Biſhop were in the King's Hands at that Time.

The 11 *H.* 4. 37, 59 and 76. tho' cited on the other Side below, is a full Authority; 'tis a noted Caſe, the ancienteſt Caſe in our Law concerning *Commendams*: The Caſe in ſhort is thus: The King brings a *Quare Impedit*, and makes his Title by the Creation of the Incumbent to be a Biſhop. There was ſome Debate on the Declaration; but the Defendants plead, that the King granted the Temporalties to the new Biſhop, before the Living became vacant. Then the King waves that Declaration, and betakes himſelf to another Title, and Declares on the Statute of Proviſors, becauſe the Pope had uſurped a Power which that Statute denied him; and there's no Judgment in the Caſe upon the firſt Point; but 'tis moſt clear, that the King's Counſel in that Caſe were of Opinion againſt this Prerogative; becauſe they did not ſtand to that Title, but amended their Declaration, and took to another.

This Point was directly to have been judged in the Caſe, if they had thought fit to abide by it: So that 'tis plain that they took the Plea to be good, if the Temporalties were in the King's Hands, then the King was to preſent; if not, that he had no ſuch Prerogative. And this is a great Authority, that the King had no ſuch Prerogative, becauſe he waves the Title and goes to another.

5 *E.* 2. *Maynard* 148. *Hugh de Courtney* brings a *Quare Impedit* againſt *Thomas de Hutwet* for the Church of *Bingham*, and ſets forth that *Iſabel de Force*, Counteſs of *Aumerle*, preſented ſuch a one, upon the Living's becoming void by Ceſſion, *viz.* by the Incumbent's being made a Biſhop; but never a Word of the King's Title in all the Caſe, or any ſuch Prerogative as is now contended for.

And in *Owen's Rep.* 144. *Walmeſly* cites a Precedent which he had ſeen, in *Edward* the Second's Time, adjudged that the King had no ſuch Prerogative; and all that was ſaid for it, was eight or nine Precedents, in Tradition or Hiſtory, of a Patron being complemented out of his Right; but not one Law Book for it.

Coke 4 *Inſt.* 356, 357. who wrote and publiſhed much, he never mentions this Prerogative; but ſays that the Law is otherwiſe; for, upon his Obſervation on a Record of 24 *E.* 3. *Rot.* 25. *coram Rege, Cornub'*,

Admittitur Epiſcopus Exon' *pro fine* 200 *merc' pro contemptu in non admittendo præſentatum Regis ad Eccleſiam de* Southwel; *pro quo contempt' omnia temporalia Seiſita fuerunt in manus Regis, & tunc temporis ante finem fact' vacavit Archidiaconat'* Cornubiæ, *ratione quod Incumbens Electus fuit in Archiepiſcopum* Dublin' *in* Hibernia, (*Temporalibus Epiſcopi* Exon' *ad tunc in manibus Regis exiſtent'*) *per quod Dominus Rex recuperavit verſus Epiſcopum dict' Archidiaconat'*. Upon this Record he makes two Concluſions;

1. Tho' *Ireland* be a diſtinct Kingdom, yet 'tis governed by the ſame Law as *England* in theſe Matters.

2. That when the Arch-Deacon was by the King preferred to an Archbiſhoprick, he had the Preſentation to the Archdeaconry in reſpect of the Temporalties of the Biſhop of *Exeter*, Patron of the Archdeaconry, and not by any Prerogative.

Here 'tis obſervable, That my Lord *Coke* took it that the Patronage, by reaſon of the Temporalties, gave to the King this Right, and not the Prerogative.

Then his next Paragraph is ſtronger, If a Biſhop in *England* be made a Cardinal, the Biſhoprick becomes void, and the King ſhall name his Succeſſor, becauſe the Biſhoprick is of his Patronage. All which implies, That if 'twere not of his Patronage, 'twould be otherwiſe, elſe why is that Reaſon added?

Obj. But then ſay they, The Pope's Uſurpation prevailed in all thoſe Times; and the Pope had it when Proviſions were in Uſe. But that can be no Argument to give the Crown a Prerogative; for the Pope was a Tyrant over the *Engliſh* Church, and by the ſame Reaſon the King may claim to be above all Laws, becauſe ſome Judges ſaid as *Hank* did in *H.* 4. *quod Papa poteſt omnia*, at that Rate no Act of Parliament ſhall bind the King, becauſe the Pope thought himſelf bound by no Law of ours. Objections anſwered.

Beſides, There were ſeveral of our *Engliſh* Monarchs and *Engliſh* Parliaments, that boldly withſtood theſe Uſurpations; and there were divers Intervals of Liberty and Freedom from that *Romiſh* Yoke, and we never read of any Exerciſe of this Prerogative in thoſe Intervals.

'Tis queſtioned in 41 *El.* and in *Owen's Rep.* 'tis ſaid that the Pope's Practiſe was no Authority to warrant a Prerogative: For they uſed to do ſtrange Things, and the Clergy then made his Will a Law; and our *Engliſh* Lawyers have always complained of it.

Obj. There's no ancient Books that mention Title by Lapſe. But 'twas anſwered, That in *Caudry's* Caſe, 'tis fetch'd from the Reign of *E.* 3. and that is no very late Reign, and Lapſe is ſo ancient, as it appears by the cloſe *Roll* 21 *H.* 3. in *n.* 12. that the Dean and Chapter pretended to it during a Vacancy of a See upon

an Advowſon of the King's own; but it appears there by a Writ to that Purpoſe, that no Lapſe *per tempus ſemeſtre* accrued on the King; which ſhews that 'twas old Law for the Subjects. *Pryn.* 2. 481.

By a Writ 8 *H.* 3. *n.* 4. *Dorſo*, *Prynne* 2 *Vol.* 389. it appears the Archbiſhop of *York* was to preſent *ſi ultra tempus ſex menſium vacari contigerint*, and 1 *Inſt.* 2 *Inſt.* and all the Books are full of it, and *Doctor and Student*, which is no new Book, treats of it, *cap.* 31. Beſides, that and this are different Caſes; there is a Neceſſity of ſuch a Law for the Service of the Church; the King is by the Conſtitution intruſted with the Supreme Care of his People, both for Religion and Property; and if a Patron will not do it in reaſonable Time, 'tis reaſonable he ſhould loſe it, and the King preſent.

But to make that a ſimilar Caſe, they ſhould ſhew that theſe Prerogatives were of equal Duration; and that there's as much Reaſon for the one as for the other: But becauſe the King hath preferred the Patron's Friend, therefore the King ſhall have it; that cannot hold upon a *Toties quoties* when the Friend is dead, and three or four more of the King's Preſenting, for by this Means the Patron may never preſent to his Church.

2. Whether (ſuppoſing the Prerogative) it be not ſatisfied by a Grant in Commendam for above ſix Months.

2. The next *Query* was, Whether this *Commendam* for above the ſix Months, with Power to take the Profits to his own Uſe, ſhall be a Fulfilling of this Turn, or otherwiſe prevent the Operation of the Prerogative on it? By this he was a plenary Incumbent after Conſecration, and he had the Profits to his own Uſe: He was not merely the Ordinary's Deputy to ſupply the Cure during ſix Months; but hath it in his own Right, and this with the King's Concurrence.

The Prerogative could only work upon an Avoidance by Promotion; and that is upon Conſecration: This becomes void at the Expiration of the Term limited.

Derived from the Pope, and not favourable.

'Tis to be conſidered, That this is none of the old Prerogatives of the Crown, which in a Competition are to be preferred before the Subjects Right: It is a Prerogative not to be favourably interpreted, but *ſtricto Jure*; for 'twas only taken up as a Papal Right: And ſo 'tis plain from 2 *Roll's Abridg.* 358, 359. As ſuch a Papal Right, it ought to be interpreted *ſtricto Jure*, even by the Pope's Law, being againſt the Patron's ordinary Right, and ſo 'tis *naturæ odioſæ*; there might be cited *Suarez* and others to this Purpoſe: Perhaps the Pope's Right was not ſo much allowed here, as to make it clear with him in this Point; for *Doctor and Student*, *cap.* 36 & 37. ſays, that the Pope's Collation of Benefices *vacantium in Curia* was held to be within the Statute concerning Proviſions, *viz.* 25 *E.* 3.

This Prerogative hath been conſtrued *ſtricto Jure* here.

1. In the Caſe which the Lord Chief Juſtice *Vaughan* Reports, where the Crown upon the Promotion of an Incumbent to the Biſhoprick of *Oxford* (and who by Diſpenſation retained his Living till Death) would have preſented to the Living when it fell void, by the Incumbent the Biſhop's Death; it was reſolved that the

King's Prerogative was not to preſent to the next Avoidance after the Promotion; but to the next Avoidance by the Promotion, which in that Caſe was none; for that the Avoidance was by Death.

2. In the Caſe my Lord Chief Juſtice *Dyer* reports 228. the promoted Incumbent was diſpenſed with to retain for a Term of Years; within which Term he reſigned; and there, upon the Avoidance, the Prerogative was not admitted to take place, becauſe the Avoidance was by the Reſignation, and not by the Promotion.

Now, if this Prerogative is to be interpreted *ſtricto Jure*, it will have no place in this Caſe, where the Incumbent promoted is diſpenſed with to retain for a Term of Time which is elapſed: For,

The King's Prerogative will have a very natural Conſtruction, by admitting his Title to preſent to all ſuch Avoidances, as commence immediately from and by the Promotion.

This is the Avoidance which the Law intends, and which the Law would always cauſe (if not hindred to operate by Diſpenſation); and this Avoidance is that therefore, which the Prerogative muſt moſt principally reſpect, and only that, if it be to be ſtrictly taken; inſomuch that were it in the ſole Power of the Archbiſhop to grant this Diſpenſation, it ſeems the King's Title would clearly be ſet aſide by it: Much more therefore ſhould it be ſo when what the Law deſigns, is prevented by the Act of the King himſelf: For tho' the Lord *Vaughan* ſaith, That the King's Concurrence to the Diſpenſation is only for Formality; yet 'tis plain that the King may force the Archbiſhop to grant it.

Now this Interpretation of the Prerogative ſeems to be already made in the Caſe cited upon a Reſignation of the Incumbent diſpenſed with: For (as it is there intimated) if the King's Title was not ſuppoſed to be gone, by the defeating of the immediate Avoidance, which the Law intended, but the King would not permit; it would be very ſtrange, that it ſhould be eluded by the Reſignation of the Incumbent, to which the King was no Party: For if the King had a Prerogative to preſent to this new, this deferred, this adjourned Avoidance, it would be more reaſonable to allow it to be haſtened, than defeated by ſuch a Reſignation before the Time.

This Prerogative ought to admit ſuch a Reſtriction from the Reaſon of the Thing, and from the Conſideration of the Inconveniencies which may otherwiſe follow.

To the Subject. A Patron might be content to let the King exchange a ſingle Life, and put in a Clerk in the Place of one removed, much rather than that the Living ſhould be held on by one in *Commendam*, that from thenceforth would be ſure to leave it, and be abſent for a better Reſidence in a Palace: Yet they may, as they have Reaſon, think it too hard, that the King ſhould, as it were, let a Leaſe of it firſt, and afterwards put in his Clerk for Life. And tho' the King doth commend here but for a ſmall Time, yet he may for a longer. He may perhaps, as the Pope

Pope did often, diſpence with the Biſhop to hold *durante beneplacito*, and when the Incumbent is in Danger of Death, then preſent another; ſo as the Patron may have his own Clerk not removed, as was firſt intended, but diſpenſed with, to wear out his Life in the Benefice, and yet after all have another put in.

The Crown may have Inconvenience by the ſtraining of it further than this. For all Strains weaken, if not break the Thing it ſelf.

This Opinion of theirs ariſes from the Principle my Lord *Vaughan* lays down, That a *Commendam* neither gives nor takes away Right, but only is a Diſpenſation to hold, and he continues Incumbent ſtill, and it prevents an Avoidance; and if ſo, why ſhould it not alſo prevent the Operation of the Prerogative too?

As to the Caſe of *Woodley*, 2 *Cro.* 691. they ſay 'tis Law, to prove the other Point for them: If it be Law for them in that Point, 'tis Law againſt them in this.

That a Diſpenſation *ad retinend'* prevents the Grantee of the next Avoidance: The Caſe was thus; a Man hath a Grant of the next Avoidance, the Incumbent is promoted, but with a *Commendam Retinere* for ſix Years, and dies, the Grantee ſhall not preſent, becauſe he is to have the next Avoidance only, and no other: 'Tis the Words of the Book, that when the Incumbent is created a Biſhop, and the King Preſents, or Grants, that he ſhall hold it in *Commendam* (which is *quaſi* a Preſentation) and he is thereby full Incumbent, and may plead as an Incumbent; if the Grantee of the next Avoidance do not then preſent, he hath loſt his Preſentation; for he ought to have the next, and he cannot have any other.

Now if this be ſo, that a *Commendam Retinere* hath ſo much of a Grant in it, and is ſo equivalent to a *Commendam ad recipiend'*, that it will ſet aſide and fruſtrate a Grant of the next Avoidance, and be it ſelf taken for a Preſentation to the next Avoidance againſt the Grantee; by the ſame Reaſon it muſt be taken ſo againſt the King, as a Preſentation to an Avoidance, and conſequently his Turn is ſerved by it.

Inconvenience of *Commendams*.

Much might be ſaid againſt thoſe *Commendams*, as promotive of Pluralities, and tending to the Ruin of the Church; and this out of our own Law-Books: But it is not material at preſent. 'Tis however to be obſerved, that this is not a Commendatory for ſix Months, during the Time that the Patron may forbear to preſent; ſuch Perſon continued then, is only *Commendatorius* under the Biſhop to provide for the Church, as 'tis his Duty to take care of it during that Time.

3. Admitting the Prerogative, and that the *Commendam* doth not ſatisfy it, whether the preſent Caſe be within it.

3. Admitting that the King hath ſuch a Prerogative; and that this *Commendam*, tho' it gives the full Perception of the Profits, is not a Fulfilling of the King's Turn, nor doth any way diſtinguiſh the Caſe, or exempt it from the Prerogative; yet this is a Caſe not within it. And this doth appear of Mr. Attorney's own ſhewing in his Declaration upon the King's Behalf: He hath ſet it forth to

be a Pariſh newly created by Act of Parliament, a Thing not *in eſſe* before. It appears by the Declaration what that Act is; it muſt be taken as 'tis there ſet forth; to this Declaration the Biſhop hath demurred: Now if by that Declaration it appears that the Biſhop, and not the King, is rightfully intitled to preſent upon this Avoidance, the Judgment will and muſt be accordingly for the Defendants.

Mr. Attorney, by his Count, doth agree an Avoidance within this Act of Parliament, by the Promotion of Dr. *Tenniſon*; and Mr. Attorney doth likewiſe admit and agree, That the King is not Patron of this Benefice called St. *James*'s; he doth agree too, That the King hath no Right given to have any Turn or Preſentment by this Act; for he ſaith, 'tis to be by the Biſhop of *London* and the Lord *Jermyn*; he doth alſo admit by this Declaration, That Dr. *Tenniſon* was never preſented to this Living; that he came not into it by Virtue of any Preſentation from any particular Patron; nay, That he did not come into it by any ſort of Preſentation whatever; nay, he yet doth further agree, That this Pariſh Church was never preſented to by any Perſon at all.

But he inſiſts upon it, That now it is void the King hath a Right to preſent to it, by Force of his Prerogative upon this Avoidance; tho' the Act ſaith, That the Biſhop ſhall preſent after the Deceaſe of Dr. *Tenniſon*, or the next Avoidance.

The *Query* is, whether the King's Prerogative can operate upon this Vacancy of this Benefice, thus filled, and thus avoided, againſt the expreſs Words of an Act of Parliament. It will be neceſſary to repeat the Words of the Act; and they are to this Effect, That all that Precinct or Diſtrict of Ground, within the Bounds and Limits there mentioned, from thenceforth ſhould be a Pariſh of it ſelf, by the Name of the Pariſh of St. *James*'s within the Liberties of *Weſtminſter*; and a Church thereupon built is dedicated by the Act to Divine Service, and that there ſhould be a Rector to have the Care of Souls inhabiting there; and then, after a full Commendation of the Merits and Services of Dr. *Tenniſon* in that Place, the now Reverend the Biſhop of *Lincoln*, It doth Enact and Ordain him to be the firſt Rector of the ſame; and that the ſaid Doctor and his Succeſſors, Rectors of the ſaid Pariſh, ſhould be incorporated and have a perpetual Capacity and Succeſſion by the Name of the Rector of the ſaid Pariſh Church, and by Virtue of that Act ſhould be enabled by the Name aforeſaid to ſue and be ſued, to plead and to be impleaded, in all Courts and Places within this Kingdom, and ſhould have Capacity to hold and enjoy, purchaſe and acquire Lands, Tenements and Hereditaments, to him and them, Rectors thereof, for ever, over and above what is given and ſettled by that Act, to any Value not exceeding 200 *l. per Annum*.

Then it Enacts, That the Patronage, Advowſon or Preſentation, after the Deceaſe of the ſaid firſt Rector or Avoidance thereof, ſhall or ſhould belong and appertain, and by that Act ſhall or ſhould be veſted in the ſaid Biſhop of *London* for the Time being, and his Succeſſors, and in *Thomas* Lord *Jermyn* and his Heirs for ever.

Then it Enacts, That the firſt Rector, after ſuch Deceaſe or Vacancy, ſhall be preſented or collated by the Biſhop of *London* for the Time being; and the next to ſucceed him, ſhall be preſented by the Lord *Jermyn* and his Heirs, and the two next ſucceeding Turns by the Biſhop and his Succeſſors, and the next Turn to the Lord *Jermyn* and his Heirs, and then the like Succeſſion of two Turns for one to the Biſhop and his Succeſſion, and of one Turn to the Lord *Jermyn* and his Heirs for ever after. This is the Act.

Now 'tis to be conſidered, That this Law doth bind the King, and would bind him in Point of Intereſt, if he had been Patron of St. *Martin's* in Right of his Crown; and if a Right or Intereſt of the Crown ſhall be bound by an Act of Parliament, a Prerogative ſhall be in no better Plight. It cannot be ſaid, That he ſhall not be obliged by it, becauſe not named; for where he is not named, he is bound by Multitudes of Statutes, according to the 5 *Rep.* 14 and 11 *Rep.* 68. He is bound by all Acts generally ſpeaking, which are to prevent a Decay of Religion; and ſo he is bound by Acts, which are for further Relief, or to give a more ſpeedy Remedy againſt Wrong.

Caſes where the King is bound, tho' not named in a Statute.

It is no Objection, that this Law is in the Affirmative; for that it is Introductive of a new Law in the very Subject, that is created *de novo*. Then before this Act the King had no Right over this; and if he hath now any over it, he can only have it, how, when, and as the Act gives it, not contrary to it; then the Biſhop was Patron of the Place out of which the Pariſh is created: And the Biſhop can claim no other Right, than what the Act gives him, *Bro.* tit. *Remitter*, 49. 'tis ſo agreed, 1 *Rep.* 48. and in 2 *Rep.* 46. if Lands be given in Fee to one who was Tenant in Tail, his Iſſue ſhall not be remitted, becauſe the latter Act takes away the Force of the Statute *de Donis*.

Suppoſe he had been Enacted to be Patron of a Living, to which he had a former Right; there could be no Remitter: Becauſe as to Particulars, the Act is like a Judgment, and eſtops all Parties to claim any Thing otherwiſe than according to the Act: And yet Remitter is a Title favoured in the Law. Then if he have this only by Force of this new Act, and another Perſon ſhould preſent in his Turn ſo given, 'twould be an Injury, if a Subject did it, and conſequently the King cannot do it: For the Prerogative which this Act gives, or which the Common Law gives, is not yet come to take Place.

Tho' this be an Affirmative Law, yet according to the Rule taken and agreed in *Slade*'s and *Drake*'s Caſe, *Hob.* 298. being introductive or creative of a new Thing, it implies a Negative of all that is not in the Purview: And many Caſes are there put to this Purpoſe.

Where a ſubſequent repeals a former Statute by Implication.

Then alſo it being particular and expreſs, it implies a Negative, becauſe this and the other are inconſiſtent.

But Firſt, 'Tis obſervable all Preſcriptions and Cuſtoms are fore-cloſed by a New Act of Parliament, unleſs ſaved. Suppoſe there was an Act of Parliament in Force before this, *viz.* That the King ſhould preſent; yet another Statute Enacting ſomewhat new and inconſiſtent will carry a Negative: And if ſo in Caſe of a former Act, there's almoſt as much Reaſon for a Prerogative. It muſt be agreed, That a Man may preſcribe or alledge a Cuſtom againſt an Act of Parliament, when his Preſcription or Cuſtom is ſaved or preſerved by that or another Act. But regularly a Man cannot preſcribe or alledge a Cuſtom againſt any Act of Parliament; becauſe 'tis Matter of Record, and the higheſt and greateſt Record which we know of in the Law. 1 *Inſt.* 115.

Suppoſe Money were by the Law payable annually, and an Act comes and ſays it ſhall be paid Quarterly, by even and equal Portions at the four Feaſts, for the firſt Year, this will certainly alter the Law.

'Tis true, that a conſiſtent Deviſe or Statute is no Repeal or Revocation: But if a new Act gives a new Eſtate different from the Former, this amounts to a Repeal. *Fox* and *Harcourt*'s Caſe.

The ſame Rule holds even in Caſe of the King, as in the Archbiſhop of *Canterbury*'s Caſe, 2 *Rep.* 46. and agreed to in *Hob.* 310. the *Query* was, if the Lands came to the King by 31 *H.* 8. *cap.* 13. or by the Stat. of *E.* 6. and objected, That the latter was in the Affirmative; yet held, That it came by the latter: Becauſe tho' they were Affirmative Words, yet they were differently penned; and the laſt being of as high an Authority as the firſt, and providing by expreſs Words, That by Authority of that Parliament they ſhould be in actual Poſſeſſion of the King, held that they ſhould be in him by Force of that laſt Act. And Reaſon will warrant theſe Differences, becauſe if otherwiſe, Inconſiſtencies and Contradictions muſt be allowed.

Then this is a new Law in the whole; 'tis a new Pariſh, 'tis a new Advowſon; and in Truth 'tis no Advowſon till the Avoidance: Nay, by the Words of the Act (if any Difference can be in an Inſtant, between, at and after, as our Law in ſeveral Caſes allows it, as *per mortem & poſt mortem*, Deviſe by Jointenant, *&c.*) there's no Patronage fixed, 'tis no Advowſon until after the Avoidance (for ſo are the Words) after the Avoidance, the Advowſon,

vowſon, Patronage, and Preſentation ſhall be veſted, *foret veſtit' in Epiſcopo* Lond' *& Domino* Jermyn, and till then 'tis veſted in Nobody; and that which is in Nobody, is not at all; unleſs it be, as ſometimes for Neceſſity ſake we ſay, *in nubibus*, or *in Abeyance*; but to ſay that an Advowſon ſhall be in Abeyance, before 'tis created or ordained to exiſt or be at all, muſt ſavour ſomewhat of Abſurdity: Now the King can have no Prerogative Turn upon an Avoidance by a Promotion, but when the Patron's Clerk was promoted and preferred; and here is no Patron till that Avoidance happen. They ſay 'tis veſted immediately, tho' to take Poſſeſſion hereafter, as a Reverſion granted *cum acciderit*, according to 3 *Cro.* 323. and 1 *Saund.* 147. But that's not this Caſe; for there is a preſent Grant; here the Words are, *After the Avoidance ſhall be veſted, and not before*; and being a new Thing it may be ſo; as a Rent-charge *de novo* may be granted to take effect *de futuro*, but cannot be ſo of an old Rent.

2. Dr. *Tenniſon* comes not in by the Patron's Preſentation, but by Donation of the Parliament; and there's not any Precedent for a Prerogative to preſent to a Donative upon a Promotion. The King cannot to preſent that, which the Patron could not have preſented to; and the Patron could not preſent to a Donative *quatenus* a Donative: And for the King to preſent to a Donative, is to injure the Patron; for 'tis to make that Preſentative, which was never intended by the Patron to be ſo. And yet in Caſe of a Donative with Cure of Souls (as it may be of a Parochial Church, tho' exempt from Ordinary Juriſdiction, according to *Yelverton* 61. 2 *Roll's Abridg.* 341.) the Ordinary may compel the Patron to Collate Somebody, as was held in Caſe of the Rectory Parochial Donative of St. *Burian's* in *Cornwall*; and the *Tower* of *London* is with Cure of Souls. 1 *Cro.* 330. 2 *Roll's Abridg.* 331. 1 *Inſt.* 144. The ſame will be void by a Promotion of the Incumbent: For 'tis not merely the Change of Inferior into Superior, that makes the Avoidance; for then an Incumbent, made Biſhop of another Dioceſe, or in *Ireland*, would not avoid the Benefice: But 'tis the Doubleneſs of the Charge, contrary to the Council of *Lateran*, which hath been received here. This is more different from the pretended Notion and Reaſon of this Prerogative, than that Caſe of a Common Donative: For in Caſe of a Donative, there's an Incumbent of the Patron's own Preferring, who is further promoted by the King, and ſtill in Being, and the ſame Patron claiming a Right to fill the ſame: Here 'tis an Incumbency by Gift of the King, Lords and Commons. And then, if it be conſidered what this new Prerogative is, for ſo it muſt be termed, ſince there's no Footſteps for it in the old Times, and the Statute of *Prærogativa Regis* (which enumerates moſt of them, and is rather a Collection of old Prerogatives then a new Statute) mentions it not; 'tis a Prerogative to preſent upon the Promotion of the Patron's Preſentee or Incumbent preſented in his Right. Here is no ſuch Thing; 'tis

as their Books ſay, when the Patron's Preſentee is advanced to a greater Dignity in the Church; and the pretended Reaſon given for it to avoid the Objection, That no Prerogative is to be injurious, or to import a Wrong done to the Subject is this, That here's no Injury to the Patron, but a Kindneſs to his Friend; becauſe the Perſon which he choſe and preferred is bettered, and further preferred to an higher Degree of Honour and State in the Church: All this fails here; ſo that there doth not ſeem to be the ſame Colour, why the King ſhould have it in this Caſe.

It is a good Argument, according to Mr. *Littleton*, That becauſe no ſuch ever was before, that therefore of Right it ought not to be: And if no Practiſe hath been to warrant it, in Caſe of a Gift by Act of Parliament, there's no Reaſon it ſhould be allowed in this Caſe; for a Prerogative never uſed, can never be with Propriety called a Prerogative; much leſs Reaſon have they for it, if they have no Practiſe or Precedents to warrant their Claim in caſe of any Donative.

Prima facie the Patron hath the Right; to evade that Right of his Mr. Attorney pretends to a Prerogative; then it being of common Right with him, they ought to demonſtrate that there is ſuch a Prerogative to control that Right in this particular Caſe: And the Arguments brought for it ought to be clear, convincing, and undoubted. Now becauſe where a Patron's Preſentee is preferred by being conſecrated a Biſhop, the King ſhall preſent; that therefore where the Parliament's Preſentee is preferred, the Patron ſhall loſe the Benefit of his Preſentation, is a *non ſequitur*; becauſe the Caſes are not the ſame: For the ſuppoſed Recompence or Conſideration in the one, holds not in the other. This is not the Caſe of a Prerogative incident to the Crown from the Neceſſity of Government: Nor is it a Prerogative which reſpects the Continuance or Improvement of the Revenue, ſo as for the Benefit of the Kingdom, an Extent or Enlargement of it beyond former Practiſe, may ſeem abſolutely needful; and therefore the common Pretences of Intendment and Preſumption, are no more on their Side than upon this; nay, 'tis rather otherwiſe: Becauſe that common Right is with the Patron.

It is no Objection to ſay, That there never was ſuch a Promotion or Avoidance before: Whether there were, or not, is not material. But that rather turns upon them; for that Evinces beyond Diſpute, that there never was ſuch a Prerogative Preſentation in Fact as they now contend for. *Argument' à ſimili* is the weakeſt, but they have no Caſe like this; nay, they have no Opinion in the Books declaring on their Side; nay, the Book Definition of this Prerogative, as was ſaid before, is only to Preſent to a Benefice vacant by Promotion, that was antecedently preſentable. Here the whole Kingdom is Patron, and all that they can pretend to, is when a Man is dignified by Promotion, who came in by Preſentation or Collation, and not otherwiſe.

It is not at preſent proper to argue when this Prerogative ſhall begin or commence upon this Church; or if ever? 'Twill be Time enough to Diſpute that, when another Occaſion offers it ſelf; when the Doctor, or any of his Succeſſors, happens to be preferred to the ſame State, as his Predeceſſor is. It ſuffices to maintain that this Turn belongs to the Biſhop of *London*.

This is not an Advowſon created, as others uſually are. Firſt, As was obſerved before, no Advowſon is fixed, or veſted, or created, but *in futuro*, the ſame Perſon is made a Pluraliſt by Act of Parliament, tho' the Act it ſelf ſays the Pariſh was too great for one Cure.

Then 'twas obſerved, That this is not a Patronage Turn. It muſt be admitted that this Act veſts the Fee-ſimple of this Advowſon in the Lord *Fermyn* and the Biſhop of *London*, and in their reſpective Heirs and Succeſſors by Turns, *viz.* to the Lord *Fermyn* one, and to the Biſhop two ſucceſſively; and ſo the Succeſſion is enacted to be for ever: Now this is not one of thoſe Patronage ſucceſſive Turns, but it is a particular Preſentation which is given to the Biſhop of *London* by expreſs Limitation: And the Penning is different. The firſt, about which the preſent Conteſt is, is to be by the Biſhop of *London* for the Time being; then the ſucceſſive Preſentations of one and two, are to be, one by the Lord and his Heirs, and the two by the Biſhop and his Succeſſors; ſo that there is no Words in the firſt that looks like the Gift of an Eſtate, but 'tis only one firſt particular Preſentation, given to the Biſhop more than ordinary: It is not one of his Turns, which he is to have as Patron, by two to one; but firſt he is to preſent one, before ever it comes into the Form and Manner of Turns preſcribed by this Act, in perpetual Succeſſion: For, if otherwiſe, the Patronage would be to the Biſhop three Turns in four, to one of the Lord *Fermyn*'s.

Objection anſwered.

As to their Objection, That a Patronage newly created ſhall be in the ſame Plight, and under the ſame Rules and Circumſtances and Incumbrances as another: That Objection can never take place before it becomes a Patronage, which this was not. And 2. with a ſtronger Reaſon, it can never take place, till it hath been preſented unto: 3. It can never take place, where a particular Preſentation is at firſt given by expreſs Words.

The Words are, *The firſt Rector ſhall be Collated by the Biſhop for the Time being, and then the Succeſſion*; and it is always to be remembred that 'tis an Act of Parliament. Now ſuppoſe the Act had ſaid that the Patronage, after an Avoidance, ſhould be veſted in *A.* and *B.* but that the firſt Rector, upon that Avoidance, ſhould be preſented by *J. S.* a third Perſon; this could never be reckoned a common ordinary Turn, ſubject to the like Prerogative as others: The Biſhop here claims not this particular Preſentation in Right of his Patronage, whereby he is to have two Turns to one; but by expreſs Gift of the Parliament.

Suppoſe the King had been Patron of St. *Martin*'s in his own Right, no Man would ſay, that this Act, thus creating of a new Pariſh, a new Rectory, and a new Patron, would not have bound him.

Surely the King's Aſſent as Supream or General Patron, is as much implied in this Act, as it would have been, had he been a particular Patron of the Church of that Pariſh, out of which the new one is taken: Here the King himſelf gives the firſt Preſentation to the Biſhop of *London*; for the King and People, all together, the whole Kingdom, are Donors or Grantors of this firſt Preſentation to my Lord of *London*.

Suppoſe ſuch a Right, as this is, were in a Subject, and he were able to preſcribe for it, he muſt then have ſet forth, that Time out of Mind, whereſoever any Incumbent of another's Preſentation was preferred by him to another Living, that he ſhould have the Preſentation *ea vice*; this is the moſt that could be made of it. Would any Man ſay, That this Caſe would fall under that Preſcription, or the Reaſon of it. Now tho' a Prerogative be Part of the Common Law, and not like a Preſcription; yet every Prerogative hath its Boundaries and its Limits, and a Reaſon for it too; or elſe 'tis no Prerogative, that our Law allows of.

Beſides, there's good Reaſon in Fact, for this Proviſion of the firſt Preſentation; becauſe the Act takes Notice of the Pariſh of St. *Martin*'s, out of which this Pariſh is taken, and the Biſhop of *London* was Patron thereof, and at firſt there's the ſame Incumbent of both, Dr. *Tenniſon*: Now the Patronage being formerly in the Biſhop, and in the Succeſſive Patronage, created of this new Church by this Act, there's one Turn in three given away from him to a third Perſon, then this Preſentation out of Turn is at firſt given to the Biſhop of *London*, in Conſideration of the third Turn given to the Lord *Jermyn* afterwards.

Then there's another Thing deſerving of Notice in this Caſe, and that's this; That one and the ſame Perſon being Incumbent of both Pariſhes, the King hath had the Effect of his Prerogative upon the Promotion of this very Incumbent, by preſenting to that Church, into which he came by Preſentation and Induction, *viz.* St. *Martin*'s; but here the Prerogative cannot operate, becauſe he came into this by Donation, not of the Patron, but of the Parliament; and conſequently, as was ſaid before, of the King himſelf.

Saving of the King's Right not in this Act.

Beſides, here's no Salvo of the King's Prerogative or other Right; and to what End in all private Acts for Sale of Eſtates, paying of Debts, docking of Settlements, and the like, do the King's Counſel take Care always to inſert a Saving, if the ſame be not neceſſary?

Here's a new Eſtate given, and that to a particular Perſon, and in a particular Manner; and no Perſon can claim a Right to, in, or over this, but as the Parliament hath given it; as for Inſtance,

Where the Prerogative ſhall not take Effect againſt an Act of Parliament.

Inſtance, in an Act where two Churches are united, as upon the Rebuilding of the City of *London*, the firſt Preſentation is ordered to be by the Patron of the Living of the greateſt Value in the King's Books. The King is Patron of the Living of the leſſer Value, as he is of ſeveral of them in *London*, he ſhall not have his Common Prerogative of the firſt Preſentation, which he hath in all other Caſes, where his Intereſt is intermixed with others: As in Caſe of Coparceners; and the Youngeſt is in Ward, he ſhall preſent firſt; tho' the eldeſt, by the Common Law, is to have the firſt Turn, and the King's Right is in the Place of the Youngeſt; but yet in Caſe where an Act of Parliament gives a new Eſtate, and preſcribes a Method, tho' in the Affirmative, the Method limited ſhall take place againſt the King's Prerogative of being preferred; and the Reaſon is, becauſe it is a new Right which the Act gave to preſent to the Church, to which the Union was, and conſequently it muſt be taken as 'tis given: And ſo was it held by the *Civilians* at *Doctors Commons*, before the Chancellor of *London*, and ſeveral aſſiſtant Delegates, upon a *Caveat* there againſt Inſtitution; and on Advice of the Lawyers, the King's Preſentee acquieſced, and never brought any *Quare Impedit*.

The Argument now is only, as to this one firſt Preſentation, there's no flat Contradiction between the Uſe of the Prerogative and my being Patron for ever; but 'tis a Contradiction, to ſay, the King and I ſhall both have the ſame Preſentation.

To ſay, That he ſhall have a Prerogative here, is to ſay, That he ſhall do a Wrong to his Subject, for the Biſhop can have no other than this one Preſentation; he can have no other in lieu of it, and has no Advantage or Recompence antecedent or ſubſequent from this Prerogative.

Firſt Fruits and Tenths.

Firſt Fruits and Tenths are not demandable from this Pariſh, becauſe no Saving of them in the Act to the King; upon paſſing the Act, 'tis known, That in the Commons Houſe the ſame was preſs'd to be inſerted, but denied, and the Clauſe rejected; the ſame Attempt was made in this Houſe, but to no Purpoſe.

In other Acts for the Erecting of new Pariſhes, there is generally ſuch a Saving, as for St. *Anne*'s, and St. *John*'s of *Wapping*, and the Act for uniting of Pariſhes, upon Rebuilding the City, hath a Clauſe of ſaving to this Effect: All which ſhews, That ſuch a Saving is neceſſary, tho' the firſt Fruits and Tenths being formerly enjoyed by the Popes might have been pretended, by Conſtruction of Law, to be a Profit annexed to the Crown by Stat. of 26 *H.* 8. *cap.* 1. all Payments to the Pope having been prohibited by 25 *H.* 8. *cap.* 21. and all Profits and Commodities enjoyed by the Popes thereby annexed to the Crown. Yet neither that Act, nor that other in the ſame Year, (whereby the Firſt Fruits and Tenths of all Eccleſiaſtical Li-

vings, that then or thereafter ſhould belong from any Parſonage or Vicarage, were granted to the Crown) were ever intended to reach this Pariſh of St. *James*'s, it being a new Creation by Act of Parliament; and becauſe in the Act no Firſt Fruits or Tenths are given or ſaved; and there's as much Reaſon to argue in that Caſe, for an implied Saving, as there is for this Prerogative.

Donatives may be made Preſentative, by the Patron's preſenting one.

Suppoſe it ſhould be admitted, That a preſentable Benefice created by Act of Parliament ſhould be ſubject to the ſame Rules as others are; yet that will not reach this, becauſe not like other Benefices till once preſented to; 'tis a peculiar ſingular Caſe, by 2 *Roll's Abr.* 342. and 1 *Inſt.* 344. If a Patron preſent to a Donative, it becomes Preſentative ever after; which ſhews, That 'tis the Preſentation which makes it Preſentative in its Nature; now here 'tis plainly a Donative till once preſented to.

Then it was ſaid, That it is not needful to engage in the Diſpute, whether this Prerogative ſhall prevail againſt the Grantee of the next Avoidance, according to *Woodley*'s Caſe, 2 *Cro.* 695. or whether that Caſe be Law, for that the ſame is plainly diſtinguiſhable from our Caſe: For there the Grantee comes in the Place of the Grantor, *quoad* that Avoidance; and he can have no better or greater Right than his Grantor would have had, if no ſuch Grant had been made: Here ours is a firſt Preſentation, granted by Act of Parliament.

Suppoſe the Donors of this Preſentation to the Biſhop had named a Perſon *in Eſſe*, to have ſucceeded upon the Death or Avoidance of Dr. *Tenniſon*; no Man will pretend that this Prerogative ſhould have prevented him. The Reaſon given in the Books cited for that Caſe of the Grantee of the next Avoidance, is, That the Patron could not grant more or otherwiſe, than under the Contingency of this Prerogative. Surely they will not ſay, That the King, Lords and Commons, were ſuch feeble qualified reſtrained Donors: Then the Parliament being the Donors, the Prerogative inſiſted upon, and the expreſs Gift to the Biſhop, are contradictory and repugnant, and cannot both be fulfilled.

It is no Argument to ſay, That if a Vacancy had been in the See, and the Temporalties in the King's Hands, then the King muſt have preſented and not the Biſhop, and that would have contradicted the Act as much as this; for that had been the ſame as if the Biſhop had preſented himſelf, for the King, during that Time, was *in loco ordinarii*.

To ſay, That the Biſhop of *London* hath no more Right by the Act of Parliament, than a Grantee of the next Avoidance hath by the Common Law, this ſurely is no very cloſe Reaſoning; for there is ſome Difference between the one and the other: Here the Act of Parliament (which hath the King's Conſent)

gives a particular and expreſs Right; and an Act of Parliament may (as *Coke* ſaith) alter, change, annul, abridge, diminiſh, qualify, enlarge or transfer any Common Law; nay, it hath the Common Law and the Prerogative too under its Control.

Upon the Whole, it was concluded, That by this Judgment, a new Prerogative is affirmed to belong to the Crown, and this is extended to a Turn after a *Commendam*, which may be a Prejudice to all the Patrons in *England*; 2. It deſtroys and makes Uſeleſs the plain and expreſs Words and Meaning of the Act of Parliament, which gives the firſt Preſentation to the Biſhop of *London*, and 3. It confirms the old *Non obſtante* Doctrine of *Commendams*, which hath always been acknowledged to be to the Prejudice of the Church; wherefore it was prayed, That the ſaid Judgment might be revers'd.

Argument for the Defendant in Error.

On the other Side it was argued, That this Judgment ought to be affirmed; for that, as to the firſt Point, tho' it hath been ſaid to be a new Thing, and grounded upon late Precedents, yet it hath been ſo often adjudged, that it doth not now deſerve a Debate; 'twas ſolemnly ſettled in *Wright*'s Caſe, and upon Conſideration, 2 *Roll's Abridg.* 343, 344. 3 *Cro.* 526. *Moore* 399. That tho' many ancient Authorities have been loſt, yet in *Brooke, Preſentment al Eſgliſe*, 61. there is the Opinion of the Biſhop of *Ely* for it. And as to the old Precedents, there's no need of Recourſe to them, becauſe continual Uſage hath been with the King in this Matter; a ſettled Opinion for an hundred Years is ſurely enough to declare the Law as to this Particular: This is ſufficient Evidence to prove this Right in the Crown, there being no Judicial Opinion againſt it. The Reaſon for this Prerogative, is becauſe the King, by the Exerciſe of his Prerogative in the Promotion, hath made the Avoidance, and it is but changing one Life for another, and poſſibly the Patron is as near the having another Preſentation, as before.

The Reaſon of this Prerogative.

Objection, that *Stat. Prærog. Regis* is ſilent, Anſwered.

It was agreed that this is none of the Prerogatives mentioned in the Statute *de Prærogativa Regis*; but then 'twas ſaid, That the Prerogative to preſent by Lapſe, is not in the Statute, and yet that is admitted; ſo that the Omiſſion of it there, can be no Objection; this is a Prerogative that follows a Vacancy occaſioned by the Exerciſe of the Prerogative: For ſuch it is to make Biſhops. The King firſt made them by the Donation of a Ring and Staff, then by a *Conge d'Eſlier*, the King gave Licence to chooſe, and approved the Perſon choſen, tho' not by abſolute Donation, as before. By the 25 *H.* 8. the Crown is reſtored to its ancient Prerogatives, and there are Letters Miſſive, directing the Choice of ſuch a Perſon. In *Wright*'s Caſe in 3 *Cro.* and *Moore*, then was the firſt Time it came in Queſtion; and it was Debated and Conſidered, and the Judgment upon Deliberation ſettled it with the King. And as to the Objection, that in *Dyer* 228. 'tis

Precedents.

ſaid, That he and the reſt of his Brethren thought otherwiſe; that Point was nothing to the Caſe then in Queſtion: But however, 'tis obſervable that the Queen preſented *Anno* 6. and the Patron did not diſpute it, as appears in *Woodly*'s Caſe. And in *Owen*'s *Rep.* 'tis ſaid, that ſeveral Precedents in *Henry* the Eighth's Time were ſearched. 'Tis true, that in 11 *H.* 4. 67. and 21 *E.* 4. 33. the King did not intitle himſelf by Virtue of his Prerogative, but by Reaſon of the Temporalties being in his Hands; thoſe Caſes can influence nothing in this Matter, becauſe the King's Prerogative conſiſts not in ouſting of himſelf, but of a Stranger; it is to preſent in the Turn of another upon ſuch a Vacancy, but not where he is intitled himſelf, there he preſents by Virtue of his own Intereſt.

Objection, Silence of the old Books, anſwered.

As to the Objection, That the old Books are ſilent about this Prerogative; 'twas anſwered, That before the Statute of *Proviſors* 25 *E.* 3. the King was defeated of his Prerogative by Reaſon of the Pope's Proviſions; and therefore the King could not have it: Whereas 'tis the Exerciſe of his Prerogative of Promotion, that gives him this Prerogative of preſenting upon this Vacancy by ſuch Promotion; and therefore that Statute was made to prevent all Incroachments: And tho' it was made to that very Purpoſe, yet the Clergy being then ſo ſtrongly united to the Pope's Intereſt, the Kings of *England* could not uſe that Prerogative, and frequent Uſurpations were made upon the Crown, till the Pope's Supremacy was denied. The 41 *E.* 3. 5. ſhews that there were ſuch Uſurpations. 7 *H.* 4. *cap.* 8. Complaint is made of them: And 5 *H.* 4. *n.* 95. *Cotton* 458. And thus it continued till the Statute about the Supremacy 28 *H.* 8. the Kings are to make the Biſhops; and then conſequently, in Point of Law, the Right of preſenting was reſtored.

Then 'twas urged, That none of the old Books do mention the King's Right to preſent by Lapſe, except in *Cawdry's* Caſe, where Notice is taken of a Caſe in the Time of *E.* 3. but that is not to be found. *Bro.* tit. *Preſentment*, 61. is as much Authority for this, as that in *Cawdry's* Caſe is for the Prerogative to preſent upon Lapſe. And this Right in Queſtion, having been enjoyed ſo long, ſhould not now have been queſtioned.

In 5 *E.* 2. *Maynard* 148, 198. there is one Inſtance of the Patron's preſenting again; but then Proviſions were common and uſual, *Walſingham* 1313. ſo that ſuppoſing the Patron did in thoſe Times preſent, the King was not concerned, becauſe 'twas then only the Pope's Right, as was thought, and the Pope might be ignorant of the Matter. And from thence 'twas argued, that the Practiſe of thoſe Times cannot be urged as Arguments in the preſent Caſe.

The King not barred by the *Commendam.*

Then 2. it was urged, That the King having this Prerogative, he is not debarred of it by the Diſpenſation to hold it, *&c.* nor by the Act of Parliament, nor by the King's Confirmation of it. The King by that did transfer no Right to the Incumbent, but merely

merely did continue him; and there was no Avoidance, but the ſame is ſuſpended: And had the Incumbent died, or reſigned, during this Time, the Church had been void by ſuch Death or Reſignation, and had debarred the King of his Prerogative: The Incumbent ſtill remains Incumbent for the Time, by Force of his firſt Preſentation, and ſo the Diſpenſation doth prevent the Avoidance: He is not in by Force of any Title which the Diſpenſation gives him, but of his old Title. *Jones* 91, 161. *Vaughan* 18.

Not by the Act of Parliament.

3. Then 'twas argued that the Act of Parliament for making this new Pariſh did not alter the Caſe. 'Twas ſaid, that the making of this a Rectory in this Manner, doth make it ſubject to this Prerogative; and that it was by no Means the Intent of the Act to debar the Prerogative. It is made a Pariſh and Rectory, ſuch as others are, ſubject to the Eccleſiaſtical Laws, as well as any other Benefice, under the Obligation to Reſidence, and liable to the Common Juriſdiction and Cenſure of the Ordinary; and 'tis to be made vacant by the ſame Ways and Means, as other Livings are; the Words *Death, or any other Avoidance*, prove it to be ſo: Lapſe will prevail upon this Rectory; and that cannot be, but becauſe 'tis made a Rectory, and Preſentative. It cannot be doubted, but that the next Avoidance might have been granted over by the Biſhop of *London* before any Avoidance was.

Suppoſe the Biſhop of *London* had died, and this Promotion had happened, ſhould not the King have preſented by Reaſon of the Temporalties; and yet that is as much out of the Words of the Act, as this is? As to its being a Donative, 'twas ſaid, That the preſent Rector doth not come in by Donation; and tho' 'tis true, That the King cannot preſent to a Donative upon ſuch an Occaſion; the Reaſon is, becauſe the Promotion doth not make a Vacancy of the Donative, it doth not make a Ceſſion; the Parſon is not ſubject to Cenſures as other Rectors are; he is ſtill in by Reaſon of the Inſtitution of the Founder; ſo that Nothing can be inferred from thence. Suppoſe the Incumbency of a Donative had been immediately turned into a Rectory, would not that have ſubjected it to this Prerogative: 'Tis admitted, That the Promotion of the Rector did make an Avoidance; then was cited *Prince*'s Caſe, 8 *Rep.* Then ſuppoſe it a Donative as to Dr. *Tenniſon*, at the ſame Time that the Church becomes vacant, the Patronage veſts; and then the King's Prerogative ſhall take place, either *eodem Inſtanti*, or before: But here the Right of Patronage did veſt immediately by the Act; he that is to preſent when the Rectory becomes void, he is Patron: 'Tis like a Reverſion granted *cum acciderit*, there is a preſent Intereſt veſted; and there's no Reaſon why it ſhould not be ſo, in Caſe of this Act of Parliament.

The Stat. of 12 *Car.* 2. for confirming of Livings, makes the then Poſſeſſors full and perfect Incumbents, as this doth: Were not theſe Benefices void, if the Parties were advanced to Biſhop-

ricks? And upon ſuch Promotions did not the King preſent? Undoubtedly he did.

Then 'twas argued, That 'twas never the Intent of this Act to ouſt the King of this Prerogative; the firſt Intent was to make a Pariſh and eſtabliſh a Rectory: That was the true Deſign. Suppoſe the Act had only veſted the Advowſon in my Lord of *London*, and had not mentioned my Lord *Fermyn*, would not this Prerogative have been conſiſtent with the Right of Patronage? As to the Pretence that the Biſhop is to preſent firſt; that is only to make a Partition: 'Tis an Explanation, That they ſhould not have it in common, but by Turns. The Holding of Dr. *Tenniſon* was reckoned as one Turn, and the Biſhop was to have the next. Beſides, every Act of Parliament is to be conſtrued according to the Subject Matter, and not further than the Act deſigns and intends: 'Tis plain, from the Nature of the Thing, That nothing was deſigned but to ſettle the Rectory, and eſtabliſh the Manner of Preſentation, according to the Agreement of the Parties: General Words ſhall not ouſt the King of his Prerogative, ſince he is not named, 3 *Cro.* 542. *Moor* 540. 7 *Rep.* 32. *Plowd.* 240. *Hob.* 146. Here are no Words which do import any Intention to reſtrain the King of that Right with reſpect to this, as he hath with reſpect to other Rectories. The King's Prerogative doth not interfere with their being two Pariſhes; this Prerogative muſt operate upon all preſentative Livings, ſo ſoon as they are made ſo.

This can never be pretended to be partly Preſentative and partly Donative; for Dr. *Tenniſon* was in by Act of Parliament as one preſented: Then it being a Ceſſion of a preſentative Rectory, whether old or new, 'tis the King's Right to preſent. *Vernon*'s Caſe, 4 *Rep.* 4. *Plowd.* 127. The Doctor came in not by Donation, but was rather placed in by Parliament, which implies in it the Conſent, and all the neceſſary Acts of the Patron and Ordinary. Suppoſe the King ſhould grant away his own Advowſon during a Plenarty, and afterwards ſuch a Ceſſion ſhould happen by Promotion; ſurely that would not deprive the King of his Prerogative; and by the ſame Reaſon it ought not in this Caſe. Wherefore, upon the whole Matter, it was prayed, That the Judgment ſhould be affirmed; and it was affirmed accordingly. Judgment affirmed.

Dominus Rex verſus *Reginald Tucker.*

Treaſon, its Eſſence. 3 Lev. 396. 4 Mod. 162, &c.

WRIT of Error to reverſe a Judgment given in *B. R.* for Reverſal of a Judgment againſt *T.* before Commiſſioners of *Oyer* and *Terminer*, upon an Indictment of High Treaſon. The Record is to the Effect following:

Ad Gen' Seſſion' de Oyer & Terminer tent' pro Com' Somerſet *apud Civitat' Wellen' in dict Com'* Somerſet *corum* Franciſco Wythens *mil' un'*, *&c.* Richardo Heath *un'*, *&c.* Georgio Strode, *mil' un' Servient'*, *&c. & aliis Sociis ſuis Juſticiariis dicti Domini Regis per Literas Patentes ipſius Dom' Regis ſub magno ſigillo* Angliæ *confect' eiſdem* Franciſco Wythens, Richardo Heath, Georgio Strode, *& aliis* aliquibus tribus vel pluribus eorum direct' *quorum alter' eorum præfat'* F. W. *vel* Richardum Heath *dictus Dominus Rex unum eſſe voluit ad inquirend' per Sacramentum proborum & legalium Hominum Com' præd' ac aliis viis modis & mediis, &c. aſſignat' per Sacrament'* Franciſci Warre *Baronett', &c. proborum & legalium hominum Com'* Somerſet *præd' adtunc & ibid' impannellat' jurat' & onerat' ad inquirend' pro Domino Rege pro Corpore Com' præd' præſentat' exiſtit quod* Reginald Tucker *nuper de* Long Sutton *in Com' præd' Gen' &* Thomas Place *nuper de* Eddington *in Com' præd' Yeoman timorem Dei in cordibus ſuis non habentes* nec debitum ligeantiæ *ſuæ ponderantes ſed Inſtigatione diabolica mot' & ſeduct' dilection' ac* veram & debit' obedientiam quas veri & *Fideles ſubditi Domini* Jacobi *Secundi nuper Regis* Angliæ, *&c. erga ipſum Dominum Regem gererent & de jure gerere tenentur ſubtrahent' & machinant' & totis viribus ſuis intendent' pacem & Communem tranquilitatem, &c. proditorie compaſſaverint imaginat' fuer' & intendebant dictum Dominum Regem* ſupremum & naturalem Dominum ſuum *ad mortem adducere & contra dictum Dominum Regem* ſupremum verum naturalem & indubitatum Dominum ſuum *proditorie levaverunt guerram, &c. contra pacem dicti Domini Regis nunc Coron' & Dignitat' ſuas ac contra formam Statut' in hujuſmodi caſu edit' & proviſ'.*

Et ſtatim de præmiſſis in Indictament' præd' ſpecificat' ſuperius eis impoſit' per cur' hic allocut' qualiter ſe vellent inde acquietari, iidem Reginald Tucker *&* Thomas Place *ſeparatim dicunt, &c.*

The Judgment is *per cur' hic quod præd'* Reginald Tucker *&* Thomas Place *ducantur & eorum uterq; ducatur uſq; ad Gaolam dicti Domini Regis Com' præd'* unde *venerunt, & ubinde uſq; ad locum Executionis trahantur & uterq; eorum trahatur & ſuper furcas ibidem per collum ſuſpendantur & viventes ad terram proſternantur*

ſternantur & uterq; eorum proſternatur & interiora ſua extra ventres eorum & utriuſq; eorum capiantur ipſiſq; viventibus ibidem comburantur, & quod capita eorum & utriuſq; eorum amputentur quodq; corpora eorum & utriuſq; eorum in quatuor partes dividantur & quod capita & quarteria illa ponantur ubi Dominus Rex ea aſſignare voluit, &c.

Argument for the King. Judgment in High Treaſon.

And now it was argued on the Behalf of the King, That this Reverſal was not juſtifiable; that the Exceptions taken below were many, and as to the Pretence that *ſecreta membra amputentur* was omitted; the ſame was not allowed as Error below, by Reaſon of the many Precedents which in the Entries did omit it. That tho' the Practiſe be common to pronounce it, yet few or no ancient Records do mention it; that in 3 *Inſt.* 210. where the Judgment is taken notice of, this is not Part. *In Plowd.* 387. 'tis omitted, that *Interiora* includes it; *In Bro. Coron'* 128. 'tis not inſerted; That this was never entred as Part of the Judgment, till 12 *Car.* 2. Then as to the *ſeparatim allocut'* upon the Arraignment, that was likewiſe over-ruled below; for it muſt be intended a ſeveral Demand or Queſtion: And the ſame is implied in this Entry, as much as if it had been expreſſed, and the Precedents are both ways. But the main and only Exception, for which the Court revers'd the Judgment, was That in the Indictment 'tis not ſaid to be a Fact done *contra ligeantiæ ſuæ debitum*; and as to this, it was argued, That it was not neceſſary to uſe thoſe very Words; That they are not Terms of Art, ſuch as are abſolutely neceſſary; they are not like to the Words *Burglariter*, *Felonice*, *Murdravit*, and the like; That *proditorie* implies it; that 'tis plainly apparent to be contrary to his Allegiance; That all the whole Indictment ſhews it to be ſo, 'tis not weighing his Allegiance; 'tis againſt his true natural Liege Lord and Sovereign; That it appears he was natural born Subject; That the very Words themſelves are only of Aggravation; That they may as well be laid precedent to the Fact as in the Concluſion; That here is that which is tantamount. That Sir *Henry Vane*'s Indictment was thus, *Cotton* and *Meſſinger*'s, *Sid.* 328. The *Scotch* Officers in *Suffolk*, *Lambert*'s, *Hackſham*'s, *Titchburn*'s, and many more.

Contrary to the Duty of his Allegiance.

That 'tis true, the Fact in the Indictment ought not to be made good by Intendment or Inference; but if there be Words which ſhew, that the Party owed Allegiance, its enough. An alien Enemy is not indictable in this Manner; but here 'tis ſhewn, That he is a Perſon capable of committing Treaſon, and that the Act done was againſt his Duty and Obedience which he owed as a Subject; That many Precedents have been thus; That *nimia ſubtilitas in jure reprobatur*; That a Certainty to a common Intent is ſufficient, *Long's Caſe*; That in 2 *Roll's Abr.* 82. *contra coron' & dignitat' ſuas* is held not neceſſary; wherefore, and for other Reaſons then urged, 'twas prayed, That the Reverſal might be reverſed, and the King reſtored, *&c.*

On

Argument for the Defendant in Error.

On the other Side it was argued, That this Reverſal was juſt; That this Arraignment being Joint, for want of *ſeparatim* makes the Proceeding Erroneous; That the Precedents do uſe the Word *ſeparatim*; and Abundance of Entries were mentioned, as *Leach* and *Ruthford & al'.* 28 *H.* 8. *Dudely*, *Gates* and *Palmer*, 1 and 2 *Phil.* and *Mar'*. *Throgmorton* and *Weddall*, 2 and 3 *Ph.* and *M. Peckham* and *Daniel*, *eodem Anno*. *Blunt* and *Danverſe*, 44 *Eliz.* Earl of *Eſſex* and *S. eodem Anno*. *Guy Fawks* and Sir *Edward Digby*, 3 *Jac.* 1. *Harriſon*, *Scot* and the other Regicides, 12 *Car.* 2. 1660. *Green*, *Berry* and *Hill*, for the Murder of Sir *E. Godfrey*, 1678. *Ireland*, *Pickering* and *Grove*, 31 *Car.* 2. *rot'* 242. *Whitebread*, *Fenwick & al'*, 32 *Car.* 2. *rot'* 224. *Johnſon & al'*, 2 *Will. & Mar. num'.* 57. and Lord *Preſton* and *Aſhton*, *Trin.* 3 *Will. & Mar. n.* 16. *ſeparatim allocut'*, and many more. Beſides the Nature of the Thing is ſuch, as requires a ſeveral Arraignment, becauſe they may plead ſeveral Pleas, and they are ſeveral Offences; and tho' they plead in this Caſe ſeverally, that's not enough; for they ought to be askt ſeverally.

Spoken to ſeverally.
Precedents.

Cut off the Privy Members.
Precedents.

But this was not ſo much inſiſted on, as the next Error, the Omiſſion of *ſecreta* in the Judgment; 'tis Part of the Judgment upon the 25 *Edw.* 3. for compaſſing, *&c.* tho' for coining, 'tis only to be drawn and hanged, according to *Morgan's* Caſe, *Cro. Car.* 383. *Stamp.* 182. 3 *Inſt.* 15, 17. *Finch's* Law, *lib.* 2. *cap. Treaſon*, they are all *ſecreta membra abſcindant'*, as well as *interiora*; all common Books have it, as *Bolton's* Juſtice of the Peace, *tit.* Precedents of Indictments for High Treaſon, 38, 42. *Dalton's* Juſtice, *p.* 335. *Sheppard's* Epitome, *tit. Crown*, and all thoſe Common Abridgments, *&c.* Lord *Preſton's* and *Aſhton's* was drawn by good Advice, *Harriſon* and *al'*, 12 *Car.* 2. *Ireland*, *Bickering* and *Grove*, 1678. *Whitebread's*, 1679. *Walcott's*, 1683. *Langhorn's*, 31 *Car.* 2. Colonel *Sidney's* 1683. The Earl of *Stafford's* in 1680. was thus, upon Debate and Conſultation with all the Judges, *Dominus Rex* verſus *Owen*, 1 *Roll's Rep.* 185, 186. there 'tis mentioned.

Contrary to the Duty of his Allegiance.
Precedents.

But then it was chiefly inſiſted on, That the Reverſal was to be maintained for the Error in the Indictment; that *contra ligeantiæ ſuæ debitum* was the general Form; that all the great Men in all Ages, who had been of Counſel for the Crown, had inſerted it: That all the Indictments, the firſt Aſſiſes, after *Monmouth's* Rebellion, which were drawn or peruſed by Sir *H. Poll'* had this Concluſion: That *Aſhton's*, *Croſs's* *Gaunt's*, *Corniſhe's*, Earl of *Stafford's*, *Bateman's*, *Ayliff's*, *Goodenough's*, *Hone's*, *Blague's*, *Rowſe's*, *Armſtrong's*, Sir *Robert Peyton's*, *Langhorne's*, Lord *Bellaſis's*, *Venner's*, *Harriſon's*, *Fawkes's*, Sir *Everard Digby's*, *Patricius Dolphie's*, *Paſch.* 41 *El. John Tipping's* 34 *El.* are all thus; and the Prints are ſo likewiſe, 3 *Inſt.* 214. *Fitzh. Juſtice*, *p.* 218. *Plowd.* 387.

Coke's Entries 361. *Cro. Car.* 120, 122, 123. and a great Number of Particulars more, which might be cited.

Then 'twas urged that Reaſon doth require this, for that Treaſon is puniſhable as a Breach of Allegiance; that that is the very Eſſence of Treaſon; that if the Fact be not alledged to be againſt his Allegiance, 'tis not Treaſon; that 'tis by Reaſon of his Allegiance that he can commit Treaſon; and therefore 'tis that an Alien Enemy, who was never protected, can't commit Treaſon, becauſe he owed no Allegiance: And there may be many Acts done, which look like a Levying of War, without any Breach of Allegiance; and for that was quoted King *John*'s Charter made at *Rumney Mead* 18 *die Junii Anno Regni* 17. *Rot. Pat.* 17. *m.* 13. a Tranſcript whereof is in *Mathew Paris* 245.* *Anno* 1215. which Charter was ratified four Times within nine Years after. The firſt Confirmation was granted 1 *H.* 3. and probably at his Coronation; for there was a Charter dated at *Glouceſter 6 Febr. Rot. Pat.* 1 *H.* 3. *m.* 13. that they ſhould enjoy *Libertatibus Regno noſtro* Angliæ *a Patre noſtro & nobis conceſſis.* In the ſecond Year of his Reign, he ſends a Mandate to the ſeveral Sheriffs to proclaim this Charter amongſt others: *Rex &c. Salutem. Mittimus tibi Chartas de Libertatibus, &c. Mandantes quatenus eas legi facias in pleno comitatu tuo. Dat' 22 Febr. Rot. Clauſ.* 2 *H.* 3. Then was cited *Fox*'s *Acts and Monuments, ad Ann.* 1218. That after *Michaelmas* this King held a Parliament at *Weſtminſter*, wherein he confirmed and ratified, by his Charter, all the Franchiſes and Liberties which were made and given by King *John* his Father. In the ſeventh Year of his Reign *viz.* the ſixteenth Year of his Age, he took the Government into his own Hands; and then the Archbiſhop of *Canterbury*, in open Parliament, doth mind him of the Oath ſworn in his Name by the Earl of *Pembroke* (*Rectore Regis & Regni*) and others, at the Pacification between him and the *Dauphin*, that he would reſtore and confirm thoſe Liberties to his Subjects, for which the War broke out between his Father and the Barons. Then was quoted what *Henry* Third promiſed, when he invited *Henry de Lucy* to come in to him, 1 *H.* 3. *m.* 16. which is in very ſtrange Language, if his Allegiance had been broken. Then was cited *Sadler* 262. and *Spelman* verbo *Ligeantia*; and *Calvin*'s Caſe, 7 *Rep.* expounding of that Word: And the old *Cuſtumer of Normandy*, *cap.* 43. And the ſaid, and other Authorities, were inforced and amplified in ſuch Manner, as is not fit to be remembred.

Requiſite in Reaſon, that thoſe Words ſhould be in the Indictment.

* Alias 215. in Edit. *Lond.* Impr. 1684.

Then 'twas urged, That as the Subject Matter of this Indictment did require theſe Words, ſo the Reaſon of the Law in other Caſes did warrant them to be neceſſary here: That *vi & armis* was neceſſary, till the Statute of *H.* 8. made it needleſs: And it would be ſtrange, that an Indictment for a Treſpaſs, ſetting forth an Aſſault and Battery with Force of Arms ſhould be ill for want of *contra Pacem*, and this ſhould be good without *contra ligeantiæ*

tiæ ſuæ debitum: Contra formam ſtatut' is neceſſary, tho' the Fact be alledged, ſufficiently appearing to be within a Statute Law. Indictments are not to be made good by Intendment or Implication, *Stamford* 96. *Trin.* 18 *E.* 4. 10. *Furatus eſt* without *felonice*, not good; *Felonice abduxit* without *cepit*, not good. So for a Rape, *quod ipſam contra voluntatem ſuam carnaliter cognovit*, without *rapuit*, is ill, 9 *E.* 4. 26. and ſo is *Dyer* 304. *Murdravit* is neceſſary: No Words or Terms of Art are to be ſupplied by any other Phraſes equivalent or tantamount in Senſe, for the ſake of Certainty; becauſe if ſuch looſe Deſcriptions ſhould be allowed, 'twould ſubject Mens Actions too much to the Power of Conſtruction. 2 *Cro.* 20, 142, 187, 527. And in all Indictments for Offences committed between *Decemb.* 15. and *Febr.* 13. 1688. the Concluſion was *contra pacem regni.* Then was cited *Vaux*'s Caſe 4 *Rep.* 39. 2 *Roll's Abridg.* 82.

Then 'twas ſaid that there were expreſs Authorities for the Defendant; 3 *Inſt.* 11. that the Indictment of Treaſon concludes thus, 1 *Inſt.* 129. is the ſame, and *Dyer* 144. to the like Effect. And what is ſaid in the Margin of the new *Dyer*, is very remarkable as to *Mary* Queen of *Scotland*: *Calvin*'s Caſe 7 *Rep.* 6. is full and expreſs, as to the Reaſon of the Thing; and it is founded upon the Difference between an Alien Enemy and a Subject. *Courteen*'s Caſe, *Hob.* 271. *Hobart* is of Opinion, according to *Calvin*'s Caſe, that Indictment againſt Alien *amie*, it muſt conclude *contra debitum ligeantiæ ſuæ.*

Beſides, here are no Words which carry the ſame Senſe, or are equivalent to it; *Proditorie* doth imply a Treachery or Falſhood, and that he might be guilty of, and yet not act contrary to his Allegiance; for at that Rate every Breach of Truſt, as to the King, would be Treaſon: *Debitum ligeantiæ ſuæ minime ponderantes* is not ſufficient; for a Man may not weigh his Allegiance, and yet not act contrary to it: Then *contra naturalem Dominum ſuum ſupremum verum & indubitat'*; theſe Words in themſelves are not neceſſary, and anciently were not inſerted: In old Time 'twas only *contra Dominum Regem*; and 'twill be hard to ſay, that the Uſe of Words unneceſſary ſhould ſupply what is neceſſary, and hath anciently been uſed. Thoſe Words do only import, that the late King was King of the Place where the Defendant was born and lived; and cannot make it appear, that his Fact was contrary to the Laws of the Land, and the Duty of his Allegiance, as a Subject to him.

Then ſuppoſing it not neceſſary in the Concluſion; for as ſome Precedents are in *Weſt*'s *Symboleography*, 'tis firſt; as *contra ligeantiæ ſuæ debitum levavit guerram*, yet it ought to be in the Indictment, in one Part or another. The formal Reaſon of the Fact's being Treaſon, is becauſe 'tis againſt his Allegiance, and that ought to be expreſſed: All the other Expreſſions urged on the other Side, are at the moſt but Argumentative, and do not directly affirm the Thing which is neceſſary to make the Offence.

As to the Precedents which are the other Way, they are but few; thoſe in the Reign of *H.* 8. and Queen *Elizabeth*, they are upon particular Statutes; as for denying the Supremacy; taking Orders under the Pope, and the like; they are not *contra ligeantiam* in the Nature of the Offence, and there *contra formam ſtatut'* is enough: But no Anſwer can be given to the Caſe of *Lopez* in *Calvin*'s Caſe, where the Judges met and conſidered how the Indictment ſhould be, and agreed to be *contra ſupremum Dominum ſuum in* Anglia; and the Concluſion to be *contra ligeantiæ ſuæ debitum.* Whereupon, for theſe and other Reaſons, it was prayed, that the Judgment of Reverſal given in the *King*'s *Bench* might be affirmed; and it was affirmed accordingly.

Judgment of Reverſal affirmed, by a Majority of one, as *Levinz* reports it.

Joſeph

Joſeph Eaſtmond, Executor of Henry Eaſtmond, and Samuel Nayle, Appellants, verſus *Edwyn Sandys Clerk, Reſpondent.*

Tithe of Herbage for Cattle for Sale, tho' formerly uſed for the Plough.

APPEAL from a Decree of the Court of *Exchequer*: The Caſe was no more than this: The Pariſh of *Yeovilton* conſiſting much in Paſture Land, and the Reſpondent having been Rector thereof for twenty Years laſt paſt and upwards, and being intitled to the great and ſmall Tithes and all other Dues within the ſaid Rectory, he did exhibit his Bill in that Court againſt the Appellant *Joſeph*, in his own Right, and as Executor of *Henry* his Father, and againſt the other Appellant *Samuel Nayle*, for Agiſtment Tithes, for depaſturing and fatting their Oxen and other unprofitable Cattle within the ſaid Rectory, from the Year 1677. to the Time of exhibiting his Bill, which was in *Michaelmas* Term 1692.

The Appellant *Joſeph Eaſtmond* by his Anſwer admitted, that he had Aſſets ſufficient to anſwer the Plaintiff's Demands; and both of them admitted, that they and the Teſtator had fatted and depaſtured divers Oxen yearly upon their Lands in the ſaid Pariſh, but ſaid, that ſome of them were firſt uſed to the Plough, and afterwards fatted when turned off from the Plough.

The Court of *Exchequer* did thereupon, *viz. May* 26. 1696. decree Tithe Herbage to be paid for the Appellants and the Teſtator's Oxen and unprofitable Cattle not uſed for the Plough; and alſo for their Oxen and unprofitable Cattle uſed for the Plough, for and during the Time they were grazed and fatted in the Pariſh for Sale, after they were turned off from the Plough. And

Argument for the Appellants.

now it was inſiſted on in Favour of the Appeal, that the Decree was unjuſt; and then were quoted ſome Texts of Scripture about muzzling the Ox, *&c.* And alſo it was urged, That that Part of the Decree concerning Oxen once uſed to the Plough, was erroneous; and there were cited all the Caſes in the Books for Exemption of Plough Cattle from Tithe Herbage, and that this was double Tithing: And it was inſiſted on, that the Reaſon of the Thing was againſt it in this Caſe, becauſe the Agiſtment of theſe Cattle was neceſſary to ſuſtain that Labour which promoted the Grain, of which Tithe was paid; that this Privilege extended to all ſuch Oxen as ever had been uſed to the Plough; that the Exemption did continue after they were forborn to be uſed at the Plough; for there was the ſame Reaſon to continue the Exemption afterwards, as there could be to allow it during the Interval, when they do not draw the Plough. And for

theſe and other Reaſons urged, 'twas prayed, That the Decree for Tithe, *quoad* ſuch Cattle as ever had been uſed with the Plough, ſhould be reverſed.

On the other Side it was urged, That the ſaid Decree is agreeable to the Law, and ſupported by many Reſolutions in the Court of *Exchequer*, that there was a Reaſon for Tithe in this Caſe; becauſe theſe Cattle, tho' formerly uſed to the Plough, they ceaſed now to belong to it, and conſequently Tithes became due. That there's a Difference in the Nature of the Thing; for when they Feed in order to Labour, the Parſon hath a Tenth of the Benefit produced thereby; but when they are fatted only for Sale, 'tis otherwiſe. That this was a ſettled and allowed Difference in the *Exchequer*; That while the Oxen are working, no Tithe ſhall be paid for their Feeding, becauſe there are Tithes of other Things ariſing by the Labour of ſuch Cattle; but when they do no Work, and are turned off to be fatted and are graz'd, there Tithes ſhall be paid for the Herbage which they Eat, they being no way beneficial to the Parſon in any other Tithes: And many Caſes in *ſcacc'* were cited to warrant this Diſtinction; and 'twas ſaid, That none could be alledged to the contrary: Wherefore 'twas prayed, That the Decree might be affirmed; and it was affirmed.

Argument for the Reſpondent.

Decree affirmed.

Magdalen Foubert Widow, Grandmother and Adminiſtratrix of Katherine Frances Lorin de Granmare, Appellant, verſus *Charles de Creſſeron Adminiſtrator, with the Will annexed of Katherine Granmare, Reſpondent.*

Will of a Foreigner, and in a Foreign Language, how to conſtrue it, and by what Rules.

APPEAL from a Decree in *Chancery*; the Caſe was thus: *Peter Lorin* (Son of the Appellant) and *Katherine de Mandoville* came to an Agreement to marry, and that the longeſt Liver ſhould take all, whether Iſſue or not: A publick Notary took and entred that Agreement in his Book, and both *Peter* and *Katherine* ſubſcribed the ſame ſo entred; and then being written fair, they ſigned it again, and the now Appellant and other Relations ſubſcribed it: They intermarried, *Peter* was kill'd in *Flanders*, and left *Katherine* with Child; afterwards, ſhe being near her Time, thought fit to make her Will, which ſhe wrote with her own Hand in *French*, in theſe Words,

The Will,

Quoy que je ſois preſentement en perfaite ſanté de corps & d'eſprit, cependant ne ſçachant de quelle maniére il plaira à Dieu de diſpoſer de moy dans ma couche, Je trove à propos de marquer jcy mes dernieres volontés: En cas qu'il luy plaiſe de me retirer de ce monde, ſi c'eſt ſa volonté de donner dés jours à mon enfant, Je luy laiſſe generalement tout ce qui peut m' appartenir, & ſupplie trés humblement Madame Foubert, *ma ſoeur Lorin & Mr'* le Bas *d'en prendre ſoin; J'eſpere que Mr.* Foubert, *& le Major, à la conſideration de feu ſon paure Pere, luy rendront lés ſervices dont il aura beſoin, & que Dieu ne l'abandonnera point: Je l'en ſupplie de toute mon ame, comme auſſi de benir toute la famille: fait a Londres ce* 16th *de Novembre* 1693. *par moy,* Katherine de Granmare. After which the ſaid *Katherine* annexed a Codicil to her

And Codicil.

Will, in theſe Words, *viz. En cas qu'il plaiſe à Dieu de retirer mon Enfant auſſy bien que moy, Je donne à Madamoiſelle le Bas ma bague de Diamans, mon Ecritoire garnie d'argent, & une boëte de rubants neufs; Je donne a Madamoiſelle Peireaus mon habit brun doublé couleur de paille, & mon habit Jaune; une demie douzanie de més Chemiſes: Je donne au fils à Jacob dix livres ſterlings pour le mettre en Métier; & à ſon pere ce qui ſe trovera dés habits de mon Mary: Je donne a Catharine Williams, ma filleule, dix livres ſterlings pour la mettre en métier; Tout le reſte de ce qui m' appartient tant en Meubles, que Linge, Vaiſſell d' argent, & Argent Monnoye, qui m'eſt dû, Je le laiſſe à ma ſoeur Lorin, & a meſſ' de Creſſeron, pour etre egallement partagé, entre eux; J'excepte ſeulement le portrait de mon Cher Mary, ma bague Turquoiſe, que Je donne à ma ſoeur Lorin, & la prie de garder l'une & l'autre tant qu'elle vivra: Je donne auſſy a Monſieur Creſſeron*

ma montre d' Or que Ie ſouhaite qu'il garde & porte pour l'amour de moy : fait à Londres ce 16th *Novembre par moy* Catherine Granmare.

Then ſhe was delivered of a Daughter, and a few Hours after died, and the Daughter did ſurvive her near two Years, and then died: And after her Mother's Death (there being no Executor named) Adminiſtration of the Eſtate of the Teſtatrix was committed during the Minority of the Child with the Will annexed; but the Appellant poſſeſt herſelf of the Eſtate, being about 600 *l.* Value. Then after the Child's Death, the Appellant as next of Kin took Adminiſtration to the Child, and alſo to Mrs. *Granmare.*

The Reſpondent exhibited his Bill, claiming a Moiety of the *Reſiduum* by Force of the Codicil; the Appellant by Anſwer inſiſted upon the Invalidity of the Agreement between *Peter* and *Katherine*, but that being waived, the Queſtion aroſe upon the Words of the Will, and particularly theſe, *donner dés jours*, and 'twas inſiſted, That nothing was deſigned to the Reſpondent, but only in caſe the Child were ſtill-born, or ſhould die in her lying in; whereupon the Court ordered the Cauſe to be continued in the Paper, and that both Sides ſhould take Time to procure the Opinion of *Frenchmen* born, and acquainted with the Laws of *France*; and the Cauſe coming on again to be heard before the Lord Chancellor; and upon reading of ſeveral Opinions of *French* Gentlemen bred to the Laws of that Country, the Court declared, that the Reſpondent was well intitled to his Moiety of the Reſidue, after the particular Legacies, Debts, Funerals, and other Allowances deducted, and decreed the ſame accordingly.

Argument for the Appellant.

It was argued on the Behalf of the Appellant, That this Decree was erroneous; that the proper Signification of thoſe Words, was no more than to give Life, that it was ſo tranſlated at *Doctors Commons*; That that Tranſlation does agree with the Opinion of ſeveral of the moſt learned Divines amongſt the *French* Refugees here; That 'tis ſo interpreted in the Famous Dictionary of the *French* Academy, dedicated to that King, where the Words are as follows, *viz. les jours au pluriel, ſignifie la vie*, That Days in the Plural ſignify Life, without any Determination of Time; That there are few *Frenchmen* of any Underſtanding, but will acknowledge, That by *lés jours d'une perſonne*, the Days of one (whether they be many or few in Number) muſt be underſtood the Life, *&c.* That the Teſtatrix here could mean no other by Days, but Life; when ſhe ſaid, That in caſe it pleaſed God to take her out of this World, if it was his Will to give Days, to give Life to her Child, ſhe left it all that belonged to her; knowing well, That if the Child was born alive, it muſt be maintain'd from that Moment, out of what was ſo left it; that it appeared from the Preamble of the Codicil, *viz.*

In

In caſe it ſhall pleaſe God to take away my Child, as well as my ſelf, then, *&c.* That the Teſtatrix never intended the Eſtate to go over, unleſs the Child died as well as her ſelf in her lying in.

Nature of other Legacies conſidered.

Then it was argued from the Nature of the particular Legacies; they were of ſuch a ſort, as that they muſt be given without Senſe or Reaſon, had ſhe not ſuppoſed her Child's Death, as well as her own, in her lying in; for otherwiſe thoſe new Ribbons muſt become old, which were intended as a Preſent to a young Gentlewoman; Clothes lockt up in a Trunk would have been of no Uſe to Perſons then in Diſtreſs, and the poor Orphan had gone too far in Years to learn a Trade. Then other Things are given as Tokens to be kept, and worn by them for her ſake, as long as they lived: Now what Reaſon can be aſſigned for this, if ſhe did not mean and ſuppoſe a Death in her lying in: From whence it was inferred, That the Intention of the Teſtatrix was to give all ſhe had to her Child, in Caſe ſhe ſurvived her; and if it did not ſurvive her, but was taken away as well as herſelf, in her lying in, then her Intention was to give that ſame All (which ſhe had given to her Child) to other People, as ſpecified in the Will; and unleſs this were the Intention, the Child muſt have ſtarved, or lived upon Charity, not having the Property of what was left it; and the Condition precedent, according to the Reſpondent's Expoſition, excludes the Child till its Years of Diſcretion; wherefore 'twas prayed that the Decree might be reverſed.

Argument for the Reſpondent.

On the other Side it was argued with the Decree, that the ſame was juſt; that no Objection could ariſe from the Nature of the other Legacies, or of this, as being reaſonable or unreaſonable; for that 'tis the Natural Right and Privilege of every Perſon, to diſpoſe of that which they have, at their Pleaſure, to do what they will with their own; a Privilege ſo certain, that though 'tis uſed many Times to ill Purpoſes, yet the Law cannot interpoſe, nor reſtrain the Proprietor, no not to preſerve him and his Family from Ruin, as daily Experience ſhews: That it is agreeable to Law and Juſtice, and to true Piety, to ſee that the Will of the Dead be performed; and tho' the Law have aſcertained how Eſtates ſhall go, when there is no Will, yet when there is a Will that diſpoſes of it otherwiſe than the Law would do; the Courts below will compel a Performance of ſuch a Diſpoſition, as the Will directs.

Then 'twas ſaid, That the Intention of the Teſtatrix, in Favour of the Reſpondent, is both Charitable and Prudent; He was her neareſt Relation in *England*, and conſidering a great Part of what ſhe left was once her Husband's, ſhe honourably gave as much to his, as to her own Relations, making her Husband's Siſter, and the Reſpondent *Charles*, reſiduary Legatees to ſhare equally; and ſo is the Decree: And to Reverſe this Decree, and

permit the Appellant to go away with the whole, (as ſhe muſt, if the Decree be reverſed) doth directly deſtroy all the Prudent and Charitable Intentions of the Teſtatrix, and carries the Eſtate where ſhe never deſigned it, *viz.* to the Appellant.

Conſtruction by *French* Lawyers.

Then 'twas argued, That the Court of *Chancery* had done well in taking the Opinion of Perſons skilled and knowing in the Matter in Queſtion; that the Gentlemen of the Long Robe of that Country, now here in *London*, did all give there Opinions, that according to their Conſtruction of theſe Words in a Will, it was an Arrival to Years of Maturity or Age enabling to diſpoſe; that unleſs the Child had lived to ſuch an Age, as that ſhe had been capable to give the ſame away, her Repreſentative in this Caſe, could not be intitled to it.

Courts conſult Merchants, &c.

Then 'twas ſaid, That Words are to be interpreted according to the Senſe and Acceptation of thoſe which uſe them: That the Teſtatrix was a Native of *France*, and therefore this Method of inquiring into her Meaning was juſt and reaſonable: That the Courts at Law have frequently conſulted Merchants about the Signification of Mercantile Terms, and *Trinity Houſe* about Marine Phraſes; ſo in like manner Grammarians, Criticks, Chymiſts, and Artificers have been in the Court of *King's Bench* conſulted, according to the Nature of the Thing in Queſtion, upon Words belonging to, and uſed in their reſpective Profeſſions: That in caſe of Words diſpoſing of an Eſtate in a Foreign Language, by the Will of a Foreigner, the Judgment of Divines or Grammarians could be no proper Direction to the Court of *Chancery*; but the Means of Information muſt be from thoſe who were acquainted with the Rules of Interpretation in caſe of Wills amongſt thoſe People: That the Opinion of thoſe Gentlemen was ſufficient to juſtify the Decree.

But then it was further argued, That here the Meaning of the Teſtatrix could not be ſuch as the Appellant would pretend, *i. e.* that ſhe meant to give her Eſtate to the Reſpondent and others, only in caſe the Child ſhe then went with ſhould be ſtill-born, or if born alive, ſhould die with the Mother in her lying in, for theſe Reaſons: Firſt, For that ſhe was ſo far from apprehending that the Child would either be ſtill-born, or if born alive, would die as ſoon as her ſelf, or in her lying in; that ſhe expected 'twould live, and as ſhe hoped, to full Age, for ſhe takes particular Care of its Education; and earneſtly recommends the ſame to the now Appellant, and others; prays God to bleſs it, and not forſake it; and hoped that all the Relations on the Father's ſide would, for the Father's ſake, do it all the Services it ſhould ſtand in need of.

Then taking it that the Teſtatrix did expect the Child to outlive her, (as unqueſtionably ſhe did) if her Meaning had been ſuch as the Appellant hath put upon her Words, the Way to have it ſure fixt to the Child, and then to the Appellant, had been to

have made no Will at all; becauſe if the Child ſurvived the Mother but a Day, or an Hour, or ever ſo little, the Law had veſted the whole, firſt in the Child in its own Right, and upon the Child's Deceaſe, in the Appellant, as Adminiſtratrix to the Child.

Suppoſe the Child had outlived the Mother for a Month, or the like, what Interpretation could have been put upon this Will? All their Arguments will hold as well to a Month, Week or Days ſurviving of the Mother, as to this of two Years; and therefore it muſt be thus conſtrued to be her Intent, that the Deviſes over ſhould take Effect, if the Child ſhould not live to an Age of Maturity, and Power of Diſpoſition.

And as to the Pretence of the Child's Starving in the mean Time, there neither is, nor can be any Weight in that, for the Intereſt and Produce of the whole, during all that Time, muſt remain and be to and for the Benefit of the Child. Wherefore, upon the whole Matter, 'twas prayed that the Decree ſhould be affirmed; and it was affirmed.

Decree affirmed.

Philip

Philip Jermyn and Sarah Uxor ejus, Plaintiffs, verſus *Mary Orchard Widow, Defendant.*

Aſſignment of a Term to B. after the Death of *A.* for the Reſidue thereof, good.

WRIT of Error to reverſe a Judgment of Reverſal given in the *Exchequer Chamber*, upon a Judgment given in the *King's Bench* for the Plaintiffs, in an Action of Treſpaſs for the mean Profits, after a Recovery in Ejectment, and Poſſeſſion had thereupon: The Caſe was this upon Record; The Plaintiffs declare that the Defendant, 1 *Sept.* 1672. their Cloſe, *&c. vi & armis, &c.* did break, and upon the Poſſeſſion of the Plaintiff did enter, and the Plaintiffs from their Poſſeſſion did expel and remove, and them ſo being removed and expelled for a long Time, *viz.* from the ſaid 1 *Sept.* 1672. to the Time of exhibiting the Bill, *viz.* 6 *May* 1685. did hold out from the ſame, by which they loſt the Profits thereof, *&c. et al' Enormia, &c.* The Defendant by Plea takes Iſſue as to the Force, and Iſſue thereon; and as to Part of the Treſpaſs, pleads the Statute of Limitations; and as to the Reſidue of the Treſpaſs, pleads that Sir *William Portman* made a Leaſe to one *Trowbridge* for 1000 Years, and by meſne Aſſignments derives a Title down to *Thomas Nicholas*; and that he in his Life-Time, by Indenture, aſſigned to the Defendant.

The Plaintiffs Reply, and as to the firſt Part of the Plea, *viz.* of the Statute of Limitations, they demur; and, as to the other Part of the Plea, they tender a Traverſe, and deny that *Thomas Nicholas* did aſſign the Premiſſes to the Defendant.

The Defendant joins in Demurrer, as to the firſt Part of the Plea, *viz.* the Statute of Limitations: And as to the other Part, ſhe takes Iſſue upon the Traverſe; which Iſſue is joined; and a *Venire* awarded *tam ad triand'* the two Iſſues, *quam ad inquirend' de dampnis*, upon the Demurrer.

The Jury find that *Thomas Nicholas* was poſſeſſed in Manner as the Defendant in her Plea hath alledged, and that he did make, ſeal, and as his Deed deliver, the Indenture in the Plea mentioned; which ſaid Indenture follows in theſe Words; and ſo ſet forth the whole; in which, after a Recital of the Leaſe, and a Deducement of the Title down, are theſe Words, *viz. The ſaid* Thomas, *as well for and in Conſideration of the natural Love and Affection which he beareth to the Defendant his Grand Child, as for other good Cauſes and Conſiderations, hath granted, aſſigned and ſet over, and by theſe Preſents doth grant, aſſign and ſet over unto the ſaid* Mary, *her Executors, Adminiſtrators, and Aſſigns, all the ſaid Cottage, Barn and Lands, and all and ſingular other the Premiſſes herein before recited or mentioned, with the Appurtenances to the ſame belonging or appertaining; together with the ſaid recited Leaſe, and all Writings and Evidences touching the*

the Premiſſes, to have and to hold the ſaid Cottage, Barn, and Premiſſes, and every Part thereof, with the Appurtenances, unto the ſaid Defendant Mary, *her Executors, Adminiſtrators and Aſſigns, from and immediately after the Death and Deceaſe of the ſaid* Thomas Nicholas, *Party to theſe Preſents, and* Mary *his Wife, unto the End of the Term; and for and during all the Reſt and Reſidue of the ſaid Term of* 1000 *Years, which ſhall be therein to come and unexpired, by and under the yearly Rents, Covenants, &c. expreſſed in the ſaid Original Indenture of Leaſe.* Then the Jury leave it to the Court, whether the Deed of Aſſignment be good in Law or not, and conclude ſpecially, if the Aſſignment be not good in Law, then they find for the Plaintiffs, and aſſeſs Damages 50 *l.* and 40 *s.* Coſts; and thereupon, *&c.*

Argument for the Plaintiff in Error.

And now it was argued for the Plaintiff; and it was ſaid in the firſt place, That this Caſe was extraordinary, that tho' the Majority of the Judges in *Weſtminſter-Hall* were of Opinion with the Plaintiffs, yet they were forced to ſue this Writ; they had the four Judges of the *King's Bench*, and the then Mr. Juſtice *Powell*, and the then Baron *Powell* concurring with the *King's Bench*; and the Chief Baron *Atkins* being abſent, the other Five in the *Exchequer Chamber* reverſed the Judgment, it having been reſolved upon the Stat. of *Eliz.* which erects that Juriſdiction, That the Concurrence of ſix are not neceſſary to reverſe, but only that ſix muſt be preſent to make a Court; ſo that here were ſix to five for the Plaintiff, and yet he hath loſt it.

How far *Vi & armis* material.

Then it was argued, That there had been two Things inſiſted on below; one was the Finding of Damages generally; and the other was to the Validity of the Aſſignment; and as to the Finding it was ſaid, That the Matter of the Force is mere Form; and if there had been no *Non proſequi*, the ſame could not make an Error; That in *C. B.* and *B. R.* the Iſſue upon the *Vi & armis, &c.* is ſeldom or never taken Notice of, no Entry is made of it upon the *Poſtea* at all, unleſs a Wounding or ſome ſuch other ſpecial Matter were mixt with it in the ſame Iſſue; That 'tis held in the Caſe of *Law* and *King*, 1 *Saund.* 81. If nothing be anſwered to the *Vi & armis* in a ſpecial Plea, 'tis well upon a general Demurrer, and the 7 *H.* 6. 13. and 1 *H.* 7. 19, are plain, That if the Party have the ſpecial Matter, which he pleads, found for him, the *Vi & armis* ſhall not be inquired of: So if the Defendant have Judgment againſt him, upon Demurrer to the ſpecial Matter pleaded by him, the *Vi & armis* ſhall never be tried, tho' Iſſue were joined upon it, but the Party ſhall be fined upon the *Capiatur, &c.* without any Inquiry: So is the *King* and *Hopper*, 2 *Cro.* 599. in a *Scire Facias*, on a Recognizance for the good Behaviour, ſpecial Matter pleaded, held, That the Jury need not inquire about the *Vi & armis*,

armis, if ſuch Special Matter be found for the Defendant; much more is it ſo, in caſe it be found for the Plaintiff; for there the Act which is found imports it, *&c.* and it ſhall be intended to be *Vi & armis*, *&c.* and the Book of *H.* 6. is full in it, no need of any Inquiry in ſuch Caſe. And in this Point both the Courts having concurred, the Counſel for the Defendant did not conteſt it.

Where Damages muſt be found or not.

Then, as to the other Matter of the Damages, which ſhould have been inquired of upon the Demurrer, 'twas ſaid, That they were releaſed upon Record: And, 'tis plain, that the Jury have found nothing upon that, becauſe the Concluſion of the Verdict doth ſhew, that they inquired and found Damages only as to the *Conceſſit* or *Aſſignavit*; they aſſeſs Damages for nothing elſe: For if the Deed did paſs the Term, then they find for the Plaintiff, and aſſeſs Damages; and if the Term did not paſs, they find the Defendant Not guilty, *&c.* the Damages cannot therefore be for both; for, if they had found any for the Matter demurred upon, it muſt have been with a *ſi Contingat*; here 'tis not ſo. And tho' the Special Fact found had been againſt the Plaintiff, it might have been for him upon the Demurrer, and conſequently the conditional Finding of the Damages here, can never be as to that.

Then it was further ſaid, That this might be ſupplied by an Inqueſt of Office, in caſe it had not been releaſed; and there was cited *Cheyney*'s Caſe, *Mich.* 10 *Jac.* 1. 10 *Rep.* 118, 119. *Writ de Valore maritagii*, Iſſue on the Tenure, and Verdict for the Plaintiff, and no Value found of the Marriage: And held ill, becauſe they ſay, an Attaint lies upon it, that being the Point of the Writ: And there the Rule is taken generally, that where an Attaint lies upon the Finding, the Omiſſion of finding ſuch Matter cannot be ſupplied by a new Writ of Inquiry; becauſe ſuch Writ of Inquiry would prevent the Party of the Benefit of his Attaint.

Then the Book ſays farther, That the Rule is, that the Court *ex Officio* ought to inquire of ſuch Thing upon which no Attaint lies; and there the Omiſſion of its being found in the Verdict, may be ſupplied by a Writ of Inquiry of Damages; as in the Caſe of a *Quare Impedit*, (*Poyner*'s Caſe, *Dyer* 135.) Iſſue found for the Plaintiff; but the Jury *per* Negligence were not charged to inquire of the four Points, Plenarty, *ex cujus Præſentatione*, *ſi Tempus Semeſtre*, and the yearly Value of the Church; there a Writ of Inquiry lies *de novo*, becauſe upon them no Attaint lies; as is the 11 *H.* 4. 80. becauſe as to them 'tis only an Inqueſt of Office: And the Book ſays further, That all the Caſes to the contrary of that Rule have paſſed *ſub ſilentio*, without due Adviſement, and were againſt the Rule of Law. So in the Caſe of *Detinue*, the Omiſſion of the Value in the finding is fatal, becauſe an Attaint lies upon a falſe Verdict in that Particular: So that by the Caſe cited, it may be only an Inqueſt of Office as to Part, which is the preſent Caſe. In that Caſe of a *Quare Impedit* in

Dyer is cited a Precedent for it, in the *Old Book* of *Entries* 110. which is a falſe Folio, for 'tis in 93. *b.* and there is the very Entry of the Writ, ſetting forth a *Recuperavit præſentation' virtute Brevis de Niſi prius, Et quia neſcitur utrum Eccleſia plena, &c.* And as the Caſe is in *Dyer*, the Plaintiff did there (as the Plaintiff doth here) releaſe his Damages, and had a Writ to the Biſhop. Now in *Heydon's* Caſe, 11 *Rep.* 6. 'tis held that no Attaint lies upon an Inqueſt of Office; and therefore 'tis, that if in a Treſpaſs againſt divers Defendants, ſome plead to Iſſue, and one ſuffers Judgment to go by Default, the Damages found on the Iſſue ſhall be chargeable upon all, and the Inquiry of Damages on the Judgment by Default ſhall ſtay; becauſe no Attaint lies upon that. 'Tis there alſo ſaid, that Attaint lies only on a Verdict on the *Miſe* of the Parties: In Treſpaſs, three Iſſues, *Non culp'* to one Part, Preſcription for a Common to another Part, and the Cattle *raptim momorderunt* in going to take Common to another, *&c.* The Jury find one for the Plaintiff, and another for the Defendant, and inquire not of the third Iſſue at all; the Plaintiff relinquiſhing his Damages on the third Iſſue, prays Judgment on the Verdict for the firſt; and held that this prevented all Error. *Mich.* 13 *Car.* 1. *B. R. Brown* and *Stephens*, adjudged, 1 *Roll's Abridg.* 786. Then as to the Caſe of *Vaſtuman* and *Row*, 11 *Car.* 1. *B. R.* in 2 *Roll's Abridg.* 722. Treſpaſs for an Aſſault, Battery, and taking Corn; Special Plea to the Battery, and Demurrer thereupon, and *Non culp'* to the Taking the Corn; the Jury find no Damages upon the Demurrer; ſaid there, That when Judgment is for the Plaintiff on the Demurrer, the Damages for it cannot be aſſeſſed on a Writ of Inquiry, but a *Venire Facias de novo* for the whole: 'Twas now argued, that that was expreſly againſt the Rule in *Cheyney's* Caſe, and that in the Caſe in *Rolls*; 'tis put with the Addition of a *Dubitatur.*

If Releaſe of Damages cures Error.

But if that be Law, there needs no Writ of Inquiry in this Caſe, becauſe the Damages, as to that Part, are releaſed; and for this, there is the expreſs Caſe of *Bentham*, 11 *Rep.* 56. In Annuity, the Parties deſcended to Iſſue; found for the Plaintiff as to the Arrearages, but no Damages and Coſts; 'twas held an imperfect Verdict, and that it could not be ſupplied by Writ of Inquiry of Damages; yet the Plaintiff releaſing the Damages and Coſts had Judgment for him; and a Writ of Error was brought, and the Inſufficiency of the Verdict was aſſigned for Error; but the Judgment was affirmed, becauſe the Plaintiff had releaſed it, *Dyer* 369, 370. *Ejection' cuſtod' terræ & hæred'*, and ill, becauſe intire Damages; and for the *hæres* no Ejectment lies; yet the Damages being releaſed, he had Judgment for the Land. And 'twas ſaid to be there held, That inſufficient finding of Damages, and finding of none, are all one. If a Releaſe of that which is ill found, will help, where ſuch Thing releaſed is directly in Iſſue; much more it ſhould do ſo, where the Thing releaſed is but obliquely inquired of, and was not put in Iſſue to the Jury; and then 'twas repeated what was ſaid before, that the Special Concluſion helps

and prevents the General Intendment which otherwiſe would be had, as to the Damages being intire; and therefore 'twas inſiſted that this made no Error, but the Judgment in the *King's Bench* ſtood good, notwithſtanding this Exception. Then the Counſel for the Defendant did likewiſe wave this, as not being the Cauſe of the Reverſal in the *Exchequer Chamber*.

Wherefore it was argued for the Plaintiff, That this Aſſignment or Grant found in the Verdict is void, and paſſed nothing; for that either it paſſed the whole Term, or no Part of it, and that immediately; that this muſt be agreed. Then 'twas ſaid, that it could not paſs the whole; for ſo to do, was contrary to the Intention of all the Parties, to the good Will of the Grantor, and even to the Hopes of the Grantee; for 'tis plain from the whole Contexture of the Deed, that the Defendant was to have nothing in the Term till the Death of the old Man and his Wife: It was undoubtedly the Meaning and Deſign of all the Perſons concerned, that the Defendant only ſhould have the Reſidue after his Deceaſe.

Arg. that nothing paſſed by the Aſſignment.

Then that the Law will not permit this, is plain from the Books; for that 'tis uncertain, how much, or if any of the Term will remain, or be in Being, at the Death of the Grantor or Aſſignor; that the Law rejects ſuch a ſmall or remote Poſſibility; that Man's Life in the Eye of the Law is of ſo great a regard, that 'tis preſumed to be of a longer Duration than the longeſt Term of Years: That this is an old Maxim, upon which Thouſands of Properties do depend; that tho' ſome Mens Reaſon may not approve it, 'tis not to be altered but by the Legiſlature. That the Law firſt prefers Inheritances, or Eſtates deſcendible; then Freeholds, or Eſtates for Life; then Chattels real or Terms for Years: The Law values and regards, what a Man and his Heirs ſhall enjoy, before that which he himſelf only can enjoy; and what he himſelf may enjoy during his Life, before what he may have only for a certain limited Time, the which he may by any Suppoſal ſurvive. Theſe are known Truths. 32 *Aſſiſ.* 6. *Plowd.* 521. If a Man be poſſeſſed of a Term for 100 Years, and grants ſo many of them as ſhall remain at the Time of his Death, this is void for the Uncertainty; otherwiſe if it be by Deviſe, becauſe there nothing takes effect till Death, and then 'tis certain how many Years he is to enjoy it. 'Tis true, a Leaſe of Land for forty Years, to commence after a Man's Death, is good, becauſe 'tis certain that the Land ſhall be enjoyed for forty Years, but here *non conſtat* in certain, that this Deed could take effect for a Year, an Hour, or at all. *Bro.* tit. *Leaſe*, 66. *Plowd.* 520. A Man poſſeſſed of a Term grants it to another during Life, 'tis as much as during the whole Term (tho' never ſo long) becauſe Life is preſumed longer; ſo if he grant all the Term that ſhall remain after his Death, 'tis all void, becauſe he reſerves to himſelf the whole; for a greater includes the leſs; and for Life is the longeſt of the two. Theſe Things are not to be

be diſputed. If both Premiſſes and *Habendum* had had this Limitation, the other Side muſt have agreed it to have been void *ab origine*, and nothing to have paſſed by this Deed.

Objection anſwered.

But then the Objection is, That the whole Term paſſes by the Granting Part, and then the *Habendum* is void, becauſe 'tis repugnant. To this it was anſwered, That in a Deed each Part hath its proper Province: The Office of the Premiſſes is to expreſs the Certainty of the Thing granted; the *Habendum* is to expreſs the Quantity and Limitation of the Eſtate. 1 *Inſt.* 6. *Plowd.* 196. *Lofield*'s Caſe, 10 *Rep.* 107. And according to *Littleton*'s Text, *Sect.* 370. all the Parts of the Indenture are but one Deed in Law; from whence it was inferred, That the *Habendum* is never to be rejected, but when there is a manifeſt, expreſs and particular Contradiction; never when the *Habendum* doth apparently ſhew the Parties Intention.

Office of Premiſſes and Habendum.

Here the Leſſee for Years grants *totum Cottagium ſuum, &c.* The Grantee or Aſſignee (if there be no *Habendum*) hath but an Eſtate at Will; whereas if he grants all his Eſtate and Intereſt in ſuch a Cottage, there the whole Term paſſeth. This is the expreſs Opinion in *Griffin*'s Caſe, 2 *Leon.* 78. *Caſe* 102. and there ſaid to have been lately ſo adjudged in *Wynnibank*'s Caſe in *B. R.* Now here's nothing in the Premiſſes, but what is general, not the whole Eſtate granted; nor is it ſaid for how long Time he ſhall enjoy it; and therefore the *Habendum* cannot be ſaid to be repugnant or contradictory, becauſe the firſt is not expreſs.

In *Stukely*'s Caſe, *Hob.* 170, 171, upon the Caſe of Grants and Exceptions, is the Learning of *Habendums* laid down, if it had been a Grant of all his Eſtate, *Habendum* after his Death, there the *Habendum* ſhall not fruſtrate the Grant; but if the Premiſſes give no certain or expreſs Eſtate, there you may alter and abridge, nay, you may utterly fruſtrate it by the *Habendum*; theſe are the Words of the Book: Then was cited 2 *Roll's Abr.* 66. and 1 *Inſt.* 48. *b.* and the ſame Caſe of *Hodge* and *Croſſe*, in 3 *Cro.* 254, 255, where 'twas ruled, That the *Habendum*, tho' void, ſhall control the implied Limitation in the Premiſſes; 'twas a Feoffment of Lands in *London*, *Habend'* to the Feoffee and his Heirs after the Death of the Feoffor: And 'twas argued in that Caſe, That the *Habend'* was void; but reſolved, That nothing paſſes, becauſe it appears to be the Intent of the Party, that nothing ſhould paſs but *in futuro*; for the Premiſſes could paſs nothing but by Implication, and that was nothing at all, becauſe the Intent was to paſs nothing preſently; and tho' there were Livery made, yet that Livery could operate only *ſecundum formam Chartæ*, and therefore the whole was void; the Reaſon was, becauſe the firſt was General, tho' the Law would have given a particular Eſtate for Life by the Livery; yet becauſe the Party gave none expreſly by particular Words, the *Habendum* was not to be rejected; many of the Rules in *Buckler* and *Harvey*'s

vey's Caſe, 2 *Rep.* 55. are applicable to this: And altho' there be a Difference, where the Deed paſſes the Eſtate, and where Livery or other Ceremony is requiſite, as to many Purpoſes; yet ſtill the Diſtinction is, where the Premiſſes do not give all the Parties whole Intereſt, or ſome other particular Eſtate, but is General, there the *Habendum* ſhall not be rejected as repugnant. 2 *Rep.* 23, 24. *Baldwin*'s Caſe.

As to the Words, together with the ſaid recited Leaſe, that can only mean the Indenture or Writing; for the Adjective *recited* implies the Intent to be ſuch: *Recited* ſignifies only a Rehearſal or Repetition of Words, ſpoken or written before; and ſo is *Recitare Teſtamentum*, *Calvin*'s *Lexicon*, and 'tis joined with the other Writings and Evidences concerning the Premiſſes; and doubtful Words are to be conſtrued according to the Nature of the Things expreſſed and mentioned with them: Leaſe in it ſelf imports only the Conveyance or Inſtrument of Conveyance, not the Intereſt in the Thing conveyed; if by Writing, 'tis called a Deed or Leaſe in Writing; if otherwiſe, a Leaſe Parol. Thus is it explained in *Blunt*'s *Law Dictionary*, and in *Knight*'s Caſe, 5 *Rep.* 55. where all the Parts of it are deſcribed: A Man may give away his Leaſe, and yet retain his Eſtate or Term: He may depoſite it as a Pawn or Pledge; and the Party, in whoſe Cuſtody 'tis ſo lodged, may maintain Trover or Treſpaſs, if it be taken from him, nay, againſt the Leſſee himſelf, the Owner of the Lands, if he takes it before the Performance of the Condition; ſo that theſe Words cannot alter the Caſe; this is not the Caſe of a Will, but of a Deed executed in the Life-Time of the Party; the Rule, and the Reaſon of the Rule about Exceptions in Grants, will hold to this; where the Grant is General, the Exception cannot be rejected as void, on Pretence of Repugnancy: The Common Law doth not care to raiſe, or make Eſtates by Implication, where the ſame Perſon hath an expreſs one; ſo is *Vaughan*, 261, 262; therefore there's no Reaſon in this Caſe, to conſtrue the whole Term to paſs by Implication in the Premiſſes, a particular Eſtate being limited in the *Habend'*, and that not being good, all is void: Here's no Purchaſer, Creditor, or Heir in the Caſe, but 'tis a mere voluntary Act to the Defendant.

Then was cited 1 *Cro.* 376. 2 *Bulſtr.* 272. of a Copyholder's Surrender, *Habend' a tempore mortis*, and held void; wherefore upon the whole it was inſiſted, That by the Premiſſes, nothing paſſed but an Eſtate at Will. That the *Habend'* giving an Eſtate or Intereſt, which was not allowable in the Law, the Deed was void, and paſſed nothing; and therefore the Verdict was for the Plaintiff, and the Judgment in *B. R.* was good, and accordingly it was prayed, That the Reverſal of that Judgment might be reverſed.

Argument for the Defendant in Error.

On the other Side it was argued, That to conſtrue this to be void, was contrary to the Intention of both the Parties; That now the Grantor and his Wife were dead, and there was no Diſpute about their Eſtates: That the Premiſſes here paſſed the whole, 'tis to her and her Executors and Aſſigns, 'tis all that Cottage; 'tis together with all his Deeds concerning it, the Deeds are concomitant with the Eſtate, and when he grants the Deeds, he certainly did deſign to paſs his Intereſt; he could never mean an Eſtate at Will, when he names the Executors, *&c.* Then was cited the Caſe of *Lilley* and *Witney*, *Dyer* 272. *pl.* 30. Grant of all his Intereſt, Eſtate, and Term, *Habend'* after his Death, the *Habend'* is void, *Plowd.* 520. 1 *Bulſtr.* 191. *Bro. Grants*, 154. *Leaſes*, 66. The Preſumption that a Man can outlive a 1000 Years, is a weak Pretence, and void of Reaſon: Equity is a Part of the Law of the Land; and here to judge this void, is unconſcionable and unreaſonable. Then was cited 1 *Anderſon* 284, 290. Grant of a Reverſion, *Habend'* after his Death, ſhall veſt immediately; the Leaſe imports and carries the Eſtate, *Peto* and *Pemberton*, 1 *Cro.* 101. Plea, That he had ſurrendred his Leaſe, which ſhews, that it carried the Intereſt, they are Synonymous. *Bro.* tit. *Grant*, 155. A Man grants *omnia firma ſua*, ſhall paſs his Term: There's no preſcribed Form for paſſing a Chattel before the Stat. of Frauds. A Man poſſeſſed of a Term, grants it to another and his Heirs, it paſſeth the whole; ſo to a Man for Life; it ſhall paſs the whole Intereſt, and ſhall go to his Executor. *Plowd.* 424. 3 *Cro.* 534. If the *Habend'* were out of the Caſe, this would paſs the whole, and if ſo, the *Habend'* is void; 'tis an old Rule and a good one, *Ut res magis valeat quam pereat*: The Lord Chief Baron *Hale* ſeem'd of that Opinion in the Caſe of *Smith* and *Tutchett*, *in ſcacc'* (but that proved a Miſtake, for that Caſe was different, and was ended by Conſent, as appeared by a Rule, *Die Mercurii* 13 *Die Maii*, *Term. Paſch.* 26 *Car.* 2. after *Hale* was removed into the *King's Bench.*) Then 'twas ſaid, that there could be no ill Conſequence in adjudging this to be a good Aſſignment; the like Caſe was never probable to happen again, that there had been a Diverſity of Opinions below Stairs, that Equity was with the Defendant, and therefore 'twas prayed, That the Reverſal might be affirmed; and it was affirmed accordingly.

Judgment of Reverſal affirmed.

Bennet

Bennett Swayne, Eſq; Petitioner, verſus *William Fawkener and John Lane, Executors of Benjamin Middleton, Defendants.*

WRIT of Error to reverſe a Judgment in the *King's Bench* given for *Benjamin* in an Action againſt *Swayne* for 20 *l.* received by him of the Profits of a Share in the *New River, &c.* The Caſe was thus;

Deviſe to *A.* not ſaying *and his Heirs,* of a Share in the New River, what paſſes by it, an Eſtate for Life, or a Fee.

Simon Middleton, Eſq; being ſeized in Fee of Seventeen Thirty-ſix Parts of the King's Moiety in the *New River* Water, and having Iſſue eight Children, *viz. Hugh, Sarah, Hannah,* and *Anne,* by his firſt Wife; and *Elizabeth, Rebecca, Benjamin,* and *Hezekiah* by his ſecond Wife, made his laſt Will; and thereby amongſt other Things, to the Intent that all his younger Children might be provided for, he deviſed Seven Thirty-ſixth Parts or Shares of the King's Moiety aforeſaid amongſt them, in manner following, *viz.* to *Sarah, Hannah,* and *Anne,* to each of them and their Heirs, one full Thirty-ſixth Part or Share of the ſaid King's Moiety, free and diſcharged from the Fee-Farm Rent payable to the King's Majeſty, and of 100 *l. per Annum* payable to *Henry Middleton* deceaſed, and his Heirs, and from all other Payments and Charges whatſoever. And alſo to *Elizabeth, Rebecca* and *Benjamin,* and to each of them, her, and his Heirs, one full Thirty-ſixth Part or Share of the ſaid *New-River* Water of the King's Moiety; only they, and each of them proportionably to ſtand charged with the Payment of the Fee-Farm Rent due and Payable to the King's Majeſty, and with the 100 *l. per Annum* to *Henry Middleton* and his Heirs, and with no other Payment or Charge whatſoever; and to his Son *Hezekiah,* and his Heirs, one full Thirty-ſixth Part or Share of the ſaid *New-River* Water, the ſaid Share being Part of the King's Moiety, to hold to him and his Heirs, with the Rents, Iſſues, and Profits thereof, from and immediately after his Deceaſe, only proportionably to ſtand charged with the Payments of the Fee-Farm Rent due and payable to his Majeſty, and with the aforeſaid 100 *l. per Annum* to the ſaid *Henry Middleton* and his Heirs; and alſo charged with 150 *l.* more towards binding out of his Brother *Benjamin* an Apprentice, when and ſo ſoon as he ſhall attain to the Age of ſixteen Years, but with no other Charge or Payment whatſoever: And further Deviſes, That in caſe any of his ſaid younger Children, Sons or Daughters, ſhall happen to die before he, ſhe, or they ſhould attain the full Age of Twenty-one Years, or be married, then and in either of the ſaid Caſes, he

he did will and deviſe that Part or Share, with the Profits thereof, of him, her, or them, ſo deceaſing as aforeſaid, to the Survivor or Survivors of all his aforeſaid younger Children, Share and Share alike, chargeable nevertheleſs with the ſeveral Payments as aforeſaid, but liable to no other Charge or Payment whatſoever: And all the reſt of his Shares in the ſaid *New-River* Water, he gives to his eldeſt Son *Hugh* and his Heirs, ſo that he permit the reſt of the Shares to be enjoyed according to his Will, and diſcharge the Fee-Farm Rent, with which they are charged: And in caſe he ſhall not do ſo, he gives the ſaid Shares, he ſhould otherwiſe enjoy by the Will, to and amongſt all other his Children and their Heirs, equally to be divided amongſt them.

Simon Middleton died ſeized the 20 *July* 1679. and after his Death, *Rebecca* having attained her Age of 21 Years died. *Hezekiah*, after Seiſin of his Share, died under 21 Years and, unmarried. *Anne*, one of the Five younger Children (which Five claimed the ſaid *Hezekiah*'s Share) by Leaſe and Releaſe ſettles the fifth Part of the Share, late her Brother *Hezekiah*'s, upon her ſelf and the Plaintiff *Bennet Swayne*, (whom ſhe afterwards married,) and after to the Children that ſhould be between them, Remainder to the Right Heirs of the Survivor of them two. *Anne* died without Iſſue; and *Bennet Swayne* after her Death received the Profits of that fifth Part of *Hezekiah*'s Share, to the Value of 20 *l.* That *Benjamin Middleton* was the only Brother of the whole Blood, and Heir of *Hezekiah*; *Et ſi, &c.*

Upon the arguing of this ſpecial Verdict, the Court below was of Opinion, That *Benjamin* was intitled to *Anne*'s Share of *Hezekiah*'s Part, as he was Brother and Heir of *Hezekiah*, *viz.* That by the Will, the Fee-ſimple and Inheritance of a Thirty-ſixth Part or Share of the *New-River* Water was given to, and veſted in each of the younger Children; and that on the Death of *Hezekiah*, one of the younger Children, unmarried, under One and Twenty Years of Age, by the Clauſe (whereby the Shares of the younger Children dying before Twenty-one, and unmarried, are given to the ſurviving Children, Share and Share alike) the five Survivors became Tenants in Common, and each was ſeized of a fifth Part only for Life, and not in Fee: That the Reverſion of *Hezekiah*'s Share, *expectant* on the Deaths of the younger Children, deſcended to the ſaid *Benjamin* his Brother and Heir; and that he on the Death of *Anne* ought to have enjoyed that fifth Part in Poſſeſſion; and therefore the Profits of it received by *Swayne* were due to *Benjamin*, and Judgment accordingly given there for *Benjamin*.

Argument for the Plaintiff in Error.

And now it was argued, That this Judgment was erroneous, for that by Virtue of the ſaid Deviſe, the ſaid *Anne* had an Inheritance in her Part of *Hezekiah*'s Share, for theſe Reaſons. 1. It is well known and agreed, That a Part or Share in the *New River* is an Inheritance, and therefore the Deviſe of all that Part or Share to any Perſon, is a Deviſe of that Part and

Share to ſuch Perſon and his Heirs; and is as much, as if a Perſon being ſeized in Fee of Lands ſhould ſay in his Will, he Deviſes all his Eſtate in thoſe Lands to *J. S.* it could be no Queſtion, but ſuch a Deviſe would convey the ſaid Lands to ſuch Deviſee and his Heirs. 2. The Share of *Hezekiah* was given to him and his Heirs, proportionably charged with the Payment of the Fee-Farm Rent to his Majeſty, and with 100 *l. per Annum* to *Henry M.* and his Heirs, and alſo 150 *l.* to his Brother *Benjamin*; and being thus charged, upon his dying before Age or Marriage, his Share, with the Profits thereof thus charged, is given to his younger Brother and Siſters, the Survivor and Survivors of them, Share and Share alike. Then 'tis Obſervable, that the Fee-Farm Rent, payable to the King, his Heirs and Succeſſors, is 500 *l. per Annum*; upon which Account 'twould be very difficult to conceive, that the Teſtator, by this Deviſe of the deceaſed's Part to the Survivors, Share and Share alike, did intend to ſuch Survivors only an Eſtate for Life, when at the ſame time he ſubjects and charges it to and with the proportionable Payment of the ſaid yearly Fee-Farm, and the 100 *l.* to *H. M.* and his Heirs, which are Rent-Charges in Fee, and cannot reaſonably be underſtood to be charged on Eſtates given barely for Life.

One Part of a Will to help to conſtrue another Part.

Beſides, The Point here is upon the Conſtruction of a Will, and the Teſtator's true Intent and Meaning, in any Part that is obſcure, ought to be collected out of any other Part or Words of the Will that may explain it: Now it being plain, that *Hezekiah*'s Part was a Fee-ſimple, and thus charged, it ſeems to be as plain, that the very Inheritance of that Part ſhould upon his Death go and remain to the Survivors, Share and Share alike; that is to ſay, That they ſhould be Tenants in Common in Fee-ſimple of that Part, the ſame being thus chargeable with the two Rents, and with the 150 *l.* to *Benjamin:* For otherwiſe this Deviſe over (which was deſigned in their Favour and for their Benefit) might have turned to ſome of their Loſſes and Prejudice: For they might have paid the 150 *l.* to *Benjamin*, and have died, before they were re-imburſed out of *Hezekiah*'s Share, had the ſame been only an Eſtate for Life; and it cannot eaſily be ſuppoſed, that he intended his younger Children by the ſecond Wife ſhould have a better Eſtate in his Shares of the *New-River* Water, deviſed as aforeſaid, than the younger Children by the firſt Wife had, but that their Shares in it ſhould be equal: But by this Conſtruction, *Benjamin* by the ſecond Venter muſt carry away *Anne*'s Share from her Siſters and Brother of the firſt Venter. Here's no need of the common Care in conſtruing Wills, not to diſinherit an Heir by general Words; for *Hugh* is diſinherited by this Will, whether this ſurviving Intereſt be a Fee, or for Life. The Intention here was to make an equal Proviſion for all the younger Children; the Part and Share of the Perſon dying, is the Inheritance in the Part and Share of the Perſon dying in the *New-River* Water; the three Siſters were

to have their Shares diſcharged of the Fee-Farm Rent; but if this be only an Eſtate for Life, then thoſe who were deſigned to have the leaſt Benefit by the Will, are to have the greateſt, for they are Heirs to *Hezekiah*; whereas the Children by the firſt Venter ſeem to be moſt favoured by the Will, becauſe they are to have their Bequeſts free from thoſe Incumbrances. The Teſtator recites his own Seiſin in Fee of ſo many Parts and Shares, and then Deviſes thoſe Parts in Fee: How can this Clauſe of Limitation to Survivors be conſtrued to mean otherwiſe, than that the whole Fee of that Proportion ſhould ſurvive? The Caſes cited in *Rolls*, on the other Side, are only Deviſes of the Land, and not of his Share.

Then 'twas ſaid, That here was no Tenancy in Common; that 'tis true, *equally divided*, and *equally to be divided*, make a Tenancy in Common; but 'tis upon the Account of the Word *divided*; that to two equally, will not be ſo conſtrued, 1 *And.* 29. and if the Word *equally* will not, why ſhould *Share and Share alike*? Theſe Words do not ſhew any Partition of the Eſtate in Fact, nor in the Intention of the Teſtator; and one of theſe is neceſſary to prevent a Survivorſhip. Wherefore, upon the whole it was prayed, That the Judgment ſhould be reverſed.

Argument for the Defendant in Error.

On the other Side it was argued with the Judgment, That the ſame was Legal, and ought not to be reverſed: For that as to the laſt Thing ſtirred, it muſt be a Tenancy in Common; the Words *Share and Share alike* imply a Diviſion, or Partition *in eſſe*, or *in futuro*, and it hath always been ſo conſtrued. The Diſtinction between *divided* and *to be divided* hath been long ſince Exploded, as importing no Difference.

Then it was argued, That here was only an Eſtate for Life given by this Clauſe to the Survivors; that a Deviſe of the Share is the ſame with the Deviſe of the Land; that the Share doth not ſignify the Eſtate or Intereſt, but the Quantity or Proportion of the Thing. Here are no Words to veſt the Inheritance in the Survivors; there are proper Words to give an Inheritance to the Children; and there are no ſuch proper Words uſed to deveſt it out of them, and to give it to the Survivors upon the Deceaſe of any one of them under Age and Unmarried. The Share or Part can only be the Thing it ſelf, not the Eſtate in the Thing; and 'tis all conſiſtent, if it be adjudged an Eſtate for Life.

Beſides, in the laſt Clauſe, when he injoins the Heir to permit the Deviſees to enjoy their Intereſts, and in caſe he do not diſcharge the Fee-Farm Rent, he gives the reſt of his Shares to and amongſt all other of his Children and their Heirs, equally to be divided among them. The Adding of the Word *Heirs* in this Clauſe, and omitting it in the Former, ſhews the

Teſtator to have a different Meaning in the firſt from what he had in the laſt.

Then were cited ſeveral Caſes to prove that *totam illam partem* carried only the Thing deviſed, not the Intereſt which the Deviſor had therein, 3 *Leon.* 180, 181, 3 *Cro.* 52. 2 *Leon.* 156, 56. and 1 *Roll's Abridg.* tit. *Eſtate*, 835, 836. 1 *Cro.* 356. *Latch* 40. and as to the 150*l.* appointed to be paid for to bind *Benjamin* Apprentice, 'twas ſaid, That the ſame was to iſſue out of the Rents and Profits. And therefore upon the whole, it was prayed, That the Judgment might be affirmed; and it was affirmed accordingly. Judgment affirmed.

Dominus

Dominus Rex verſus *Epiſcop' Ceſtr'*, and *Richard Pierſe, Eſq.*

Knight how Part of the Name.
Matters traverſable in *Quare Impedit.*
Miſrecitals where not to hurt Grants of the Crown.
2 Salk. 560.
2 Mod. 297.
Winch. Intr. 864, 894.

WRIT of Error upon a Judgment in a *Quare Impedit* in *C. B.* given for the King, and affirmed in *B. R.* The Caſe upon the Record was to this Effect: Mr. Attorney General declares, That Queen *Elizabeth* was ſeized of the Advowſon of the Church of *Bedall ut de uno groſſo per ſe, ut de feodo & jure, in jure coronæ ſuæ* Angliæ; and being ſo ſeized did, ſuch a Day in the Twelfth Year of her Reign, preſent to the ſaid Church then vacant *John Tymms*, as by the Inrollment of, *&c.* appears; that he was inſtituted and inducted; that Queen *Elizabeth* died ſeized of ſuch her Eſtate of and in the Advowſon aforeſaid; that the ſame deſcended to *Jac.* 1. *per quod* he was ſeized of the Advowſon of the ſaid Church *ut de uno groſſo, &c.* That the Church became void by the Death of *Tymms*, and that the King preſented Dr. *Wilſon*; that he was admitted, inſtituted, and inducted; that *Jac.* 1. died ſeized of ſuch his Eſtate in the ſaid Advowſon, and the ſame deſcended to *Car.* 1. and he became ſeized; and the Church was again void by the Death of the then Incumbent; and *Car.* 1. preſented Dr. *Wickham*; that Dr. *Wickham* died; that thereupon one *John Pierſe*, not having any Right to preſent to the ſaid Church, *ſed uſurpando ſuper dict' nuper Regem Car.* 1. did preſent one *Metcalfe*, who was inducted; that *Car.* 1. died ſeized; that the Advowſon deſcended to *Car.* 2. that the Church became void by the Death of *Metcalfe*; that *Car.* 2. preſented *Samways*, who was inducted; that *Car.* 2. died ſeized, and the ſame deſcended to *Jac.* 2. who became ſeized *ut de uno groſſo, &c.* who being ſo ſeized *de regimine hujus regni* Angliæ *ſe dimiſit*, by which the ſaid Advowſon came to the preſent King and Queen, and they were, and are now ſeized of it *ut de uno groſſo, &c.* That the Church became void by the Death of *Samways*, and it belongs to the King and Queen to preſent a fit Perſon; but the Defendants hinder them *ad dampnum, &c.*

The Biſhop pleads, that he claims nothing in the Advowſon, but as Ordinary, *&c.*

The other Defendant, *Richard Pierſe*, pleads, That the King *occaſione præmiſſor' ipſum præd'* Richardum *impetere ſeu occaſionare non debet, quia dicit, quod bene & verum eſt, quod* Car. 1. *devenit & fuit ſeiſitus* of the Advowſon aforeſaid *ut de uno groſſo per ſe, ut de feodo & jure, modo & forma præd' in narr' præd' ſpecificat'*, and did preſent *Wickham* his Clerk, who was inducted. But he ſays further,

further, That the Church being ſo full of the Incumbent, and *Car.* 1. ſo ſeized as aforeſaid, the ſaid *Car.* 1. by his Letters Patent, *&c.* bearing Date at *Canbury*, 19 *Julii anno regni ſui decimo quarto, quas idem* Richardus *hic in curia profert, ex ſpeciali gratia, certa ſcientia, & mero motu*, for himſelf, his Heirs and Succeſſors, did give and grant *cuidem* Willielmo Theckſton, *adtunc armig' & poſtea milit'*, the Advowſon aforeſaid, to hold to him and his Heirs to the Uſe of him and his Heirs for ever, *prout per eaſdem Literas Patentes plenius apparet*; by Virtue of which ſaid Grant, the ſaid *Theckſton* was ſeized of the Advowſon in Queſtion *ut de uno groſſo, &c.* And he being ſo ſeized, the Church became void by the Death of *Wickham, poſteaque ac eodem tempore quo ſuperius in narr' præd' ſupponitur præd'* Johannem Pierſe *uſurpaſſe ſuper præd' nuper Regem* Car. 1. He the ſaid *John Pierſe* uſurping upon the ſaid *William Theckſton* (to whom of Right it then belonged) did preſent the ſaid *Metcalfe*, who was accordingly inſtituted and inducted, by which the ſaid *John Pierſe* was ſeized of the Advowſon aforeſaid; and being ſo ſeized, and the Church then full, he the ſaid *Theckſton* did by Indenture 18 *Apr.* 18 *Car.* 1. releaſe to the ſaid *John Pierſe* and his Heirs all his Right, Title, Claim, *&c.* by which the ſaid *John Pierſe* became ſeized, and he dying ſeized, the ſame deſcended to the Defendant *Richard* as his Son and Heir, by which he became ſeized; and then the Church became void by the Death of *Metcalfe*, and continued void for a Year and half, and more, and by that Reaſon, *Car.* 2. to the Church ſo void, *per lapſum temporis in defectu Patroni, Ordinarii & Metropolitani, jure Prærogativæ ſuæ Regiæ eidem* Car. 2. *devolut'*, did preſent *Samways* his Clerk, who was inducted, and afterwards died; and the Church being ſo void, the Defendant preſented one *Scroop*, his Clerk, *abſq; hoc quod præd' nuper Rex* Car. 1. *obiit ſeiſitus* of the Advowſon aforeſaid, in Manner and Form as the Attorney hath declared; *Et hoc paratus eſt, &c. unde petit jud' & breve Epiſcopo, &c.*

Scroop pleads the ſame Plea, *mutatis mutandis.*

The Attorney General craves *Oyer* of the Letters Patent produced in Court, and they are read to him, and are to this effect: They recite, That Queen *Elizabeth* had by her Letters Patent, *Anno* 13. *Regni ſui*, granted to the then Earl of *Warwick* all thoſe Manors of *Bedall* and *Aſcough*, *&c.* and all Advowſons and Rights of Patronage thereunto belonging, *&c.* rendring a Rent; and that *Jac.* 1. had granted the Rent to Sir *Chriſtopher Hatton & al'*, and that the ſaid Manors and Rents by good Conveyances in the Law had come to Sir *William Theckſton*, Knight, and that he then had and held the ſame to him and his Heirs; then 'tis, Know ye, That we for divers good Cauſes and Conſiderations, and of ſpecial Grace, *&c.* do ratify and confirm to him the ſaid *William Theckſton* and his Heirs, *&c.* all thoſe, *&c.* then it follows, That whereas the ſaid *William Theckſton*, by

Virtue of the ſaid Letters Patent, made to the ſaid Earl of *Warwick*, and lawful Conveyance of the Premiſſes to himſelf made, doth claim to have the Advowſon of the Church of *Bedall* aforeſaid, according to the Tenour and Intent of the ſaid Letters Patent; and whereas he the ſaid King *Car.* 1. upon the Death of one *John Petty*, had by Lapſe preſented *Wilſon*, and after his Death, the ſaid *Theckſton* claiming the Right of Preſentation, the ſaid King *ad dictam Eccleſiam ſic vacantem* (*ut ad præſentationem ſuam pleno jure ſpectant*') had preſented Dr. *Wickham*, and that the ſaid *Theckſton*, to recover his Right, had brought his Writ of *Quare Impedit*, upon which Iſſue was joined; That afterwards it was agreed between *Theckſton* and *Wickham*, that *Wickham* ſhould enjoy it during his Life, and that *Theckſton* and his Heirs ſhould have it quietly for ever after, *prout ex informatione dicti* Wickham *noſtri Capellani in ordinario accepimus*; *Nos igitur volentes*, That the ſaid Preſentations of the ſaid *Wilſon* and *Wickham*, or either of them, or their or either of their Inſtitution and Induction, ſhould not hurt the ſaid *Theckſton's* lawful Right of preſenting to the ſaid Church for the future; and it is our further Intention, That the ſaid *William Theckſton*, his Heirs and Aſſigns, ſhall freely and peaceably have and enjoy the ſaid Advowſon of the ſaid Church of *Bedall*, according to the Tenour and true Intent of the ſaid Letters Patent, granted by the ſaid Queen to the ſaid *Ambroſe* Earl of *Warwick*; any Defect or Defects in the ſame Letters Patent notwithſtanding.

And then follows the Grant it ſelf in theſe Words, *Sciatis igitur quod nos ex uberiori & ſpeciali gratia noſtra, &c.* Know ye therefore, That we of our more abundant and ſpecial Grace, and of our certain Knowledge and mere Motion, have given and granted, and do by theſe Preſents, for our ſelves, our Heirs and Succeſſors, give and grant to the aforeſaid *William Theckſton* the Advowſon, Donation, free Diſpoſition, and Right of Patronage of the aforeſaid Church of *Bedall*, and all our Right, Eſtate, Title, Intereſt and Claim whatſoever, of preſenting to the ſaid Church, whenſoever or howſoever it ſhall become void: *Quibus lectis & auditis*, the Attorney General demurs, and the Defendant joins; and Judgment in *C. B. pro Domino Rege*, upon this Reaſon only, that this Grant was void; the Advowſon being in Groſs, and nothing was intended to paſs but an Advowſon Appendant, and ſo the King was deceived; and upon a Writ of Error in *B. R.* the Judgment was affirmed upon another Point, *viz.* That the Grant pleaded was to *William Theckſton*, then Eſq; and afterwards Knight, and the Grant ſet forth upon *Oyer*, was to *William Theckſton*, Knight; and there were Three Judges of Opinion with the Patent, and one only againſt it; and one Judge of Opinion with the Plaintiff in the Error, as to both the Validity of the Patent it ſelf, and the Identity of the Perſon named in the Plea and Patent.

And now it was argued for the Plaintiffs in the Writ of Error, That this Judgment was erroneous; and firſt it was anſwered to the Objection of the Variance between Knight and Eſq; and it was ſaid, That in caſe of a Title of Worſhip, the Want of it could never vitiate a Grant; that even in Indictments upon the Statute of Additions, a Gentleman may be called Eſquire, and ſo *econtra*, and thus is 2 *Inſt.* that here *conſtat de perſona*, there's nothing doth appear to ſhew them to be Different; that in Caſe of Feoffments, this Pretence will not hurt, becauſe the Perſon is aſcertained; and here 'tis likewiſe the ſame, it is *William Theckſton* then Eſq; and afterwards Knight, 'tis but one Man, they are two different Affirmations concerning the ſame Perſon; that in the Caſe cited on the other Side of the Earl of *Pembroke* in *Jones*'s *Rep.* and in 1 *Cro.* 173. and *Litt.* 191, 223. *Richardſon* and *Hutton* are of Opinion, That ſuch Grant is good; then 'twas ſaid, That 'twould be very hard to intend them ſeveral Perſons, in order to avoid a Grant; that *Veritas nominis tollit Errorem demonſtrationis Perſonæ*; that he was *William Theckſton*; that if it had been ſaid, *conceſſit Willielmo Theckſton* generally, that would have been ſufficient; and his being an Eſq; doth not exclude his being a Knight, ſo that 'tis not a falſe Deſcription; 25 *Edw.* 3. 19. a Writ was abated, becauſe ſhewn that they were two Perſons; but held that if it had appeared that they had been but one, 'twould have been well. Then was cited the Mayor of *Lynne*'s Caſe, 10 *Rep.* 126. 'Tis true, this is a Name or Title of Dignity to ſome Purpoſes, but not to all: It muſt be agreed to be ſo upon Originals and Indictments, and there is a very good Reaſon for it; becauſe in that Caſe a greater Certainty is required, that one Man may not ſuffer for or inſtead of another; but in Caſe of Grants, any Deſcription of the Perſon is ſufficient; beſides, if a Name be miſtaken in a Writ or Indictment, anothr may be ſued or preferred by the true Name; but a Man cannot of common Right demand a new Grant. Tho' this be a Grant from the Crown, 'tis the ſame Caſe; for the King's Grant ſhall be taken moſt beneficially for the Support of his Honour, 6 *Rep.* 6. that here's no Colour to pretend two *William Theckſtons*.

Argument for the Plaintiff in Error.

Whether the Addition of Knight neceſſary.

Then it was ſaid, That this at moſt was only an Addition or Enlargement to his Name, not Parcel of the Name it ſelf; for no more goes to that, than Chriſtian and Surname. Then 'twas ſaid, 'tis generally known, that the Uſe of Surname was not ſettled amongſt us, till long after the Conqueſt; that before then they were named by their Titles, Offices, Places of Birth or Reſidence, or Employments, as doth appear plainly by *Dugdale* 1 *Monaſt.* 37. In thoſe Days *Miles* was uſed inſtead of the Surname, immediately after the Chriſtian Name, as *Ego Wolwardus Miles*, and many more ſuch, *Selden*'s *Tit. of Hon.* 637, 638. thus in 1 *Monaſt.* 166. *Donum Algari militis*, 2 *Monaſt.* 173.

853. thus it was in the Time of *H.* 2. then after Surnames came to be uſed; this Title of *Miles* was alſo uſed as an Addition or Inlargement after the Surname. *Camden's Treatiſe of Surnames* in his *Remains*, and *Kennett's Parochial Antiquities*, lately Printed at *Oxford*, in *4to.* do ſhew this, That the Title of Kt. came after the Surname as an Increaſe, not in lieu of it, as Merchant, Mercer, *&c.* Profeſſor of Divinity, Law, Muſick, Maſter of Arts, *&c.* for further Diſtinction ſake. Then it was ſaid, That this Uſe of Surnames holds not in Caſe of Biſhops, Dukes or Earls; for they add only the Place, and therefore the Deſcent, or Acceſſion of the Honour, comes inſtead of the Surname: So is 2 *Inſt.* 666. but now *William Theckſton*, when made a Knight, he remains *William Theckſton* ſtill, he loſes no Part of his former Name, tho' the ſame be inlarged; if it had been otherwiſe 'twould have merged the Surname, but his Title makes no Alteration therein at all. The Law doth require a Man to be named only by his Chriſtian and Surname, unleſs ſomewhat comes in lieu of the laſt, or the firſt be altered by Confirmation. A Grant is good, if the Party be ſo deſcribed, as that he may be known, tho' there be a Miſtake in it, yet 'tis good: As a Grant to an Earl or Biſhop, by a wrong Chriſtian Name, hath been held, 2 *Roll's Abr.* tit. *Grants*, 44. *Dyer* 376. 'tis the Identity of the Perſon, which the Law doth moſt regard and value; and therefore, ſince there was no Pretence, but that the ſame Perſon who granted it to *Pierſe*, was intended by and in the King's Patent; it was hoped, That ſuch a Nicety ſhould not loſe the Subjects Inheritance in this Advowſon, which he had bought for a valuable Conſideration. Further it was ſaid, this could not hurt upon the *Oyer* of this Grant in this Record, as this Caſe ſtood, and ſhould be further ſhewn anon.

Then it was argued, That either take the Caſe upon the Declaration and Plea alone; or take it as it ſtands upon the Letters Patent alone; either of theſe two ways, 'tis with the Subject. If the Patent be conſidered by it ſelf, there's nothing appears to make it void. The King had a Power to grant, and there are Words ſufficient to paſs it. Then conſider the Declaration and Plea, there's a good Bar to the Title laid in the Declaration; ſo that the only Objection can be upon the Rules of pleading, as it ſtands all together: And the *Query* is, If *P.* hath owned or confeſſed any ſuch Thing, as is pretended of a Seiſin in Groſs, in *Eliz. anno* 12. and if it be admitted, whether the King can take an Advantage of the Variance between the Patent ſet forth on *Oyer*, and that which is pleaded, the ſame being only pleaded by way of Inducement? whether the King can waive his own Title, and queſtion the Defendants in this Caſe?

As to the firſt, it was ſaid, That this Grant was not void by Reaſon of any ſuch Admiſſion. The King declared his full Intention, That Sir *William* ſhould fully and freely enjoy this Ad-

vowſon, any Defects to the contrary notwithſtanding. That 'tis not admitted in this Caſe to have been an Advowſon in Groſs, in the 12th of Q. *Eliz.* no ſuch Thing doth appear; and then the Grant of *Car.* 1. is good. And if it did ſo appear, yet the Grant is good. The Plea doth ſay, that *Car.* 1. came to it by Deſcent, but that doth not admit her ſeized in Groſs: That Allegation in the Declaration is mere Surpluſage and Immaterial, and cannot hurt the Party which makes it, tho' contradictory to, or inconſiſtent with his Title: Nor can it benefit the other Side to deny it; for if he had denied it, it could have done him no good; and conſequently to admit it, ſhall not hurt him. Now 'tis not neceſſary in a *Quare Impedit* to alledge a Time of Seiſin; a Seiſin generally in Time of Peace is enough; then the not denying admits only what is materially alledged. Suppoſe the Defendant hadpleaded, *abſque hoc*, that Q. *Eliz.* did preſent *Tymms modo & forma*; and it had appeared upon the Trial, that he was preſented in the 43d Year of her Reign, it muſt have been againſt the Defendant. Even, where Time is required to be alledged, another Time may be proved, as in Treſpaſs, Battery, *&c.* The moſt that can be pretended to, is, that here is an Admiſſion of her being ſeized in Groſs after the Grant to the Earl; and it might be appendant then, and afterwards got to the Crown by Preſentations; there's no Colour to ſuppoſe an Admiſſion of the Time. *Hob.* 71. The Caſe of *Sherly* and *Wood*, and 2 *Leon.* 99. prove that neither Alledging or Confeſſing a Thing immaterial ſhall hurt; the Reaſon is the ſame for both.

Surpluſage not to vitiate.

There was a plain Artifice in this Pleading; the Declaration mentions a Preſentation, *prout per* Inrolment, which cannot be, unleſs in the ſame Court; otherwiſe you muſt plead an Exemplification. *Wymock*'s Caſe, 5 *Rep.* If the Declaration had been in the common uſual way, ſetting out the Queen to have been ſeized generally, or to have preſented generally, there had nothing appeared to have hurt this Grant; for it might then have been appendant; and if it might be ſo, it ſhall be intended to be ſo; for he is not bound to aver it to be appendant; for upon *Oyer* every Thing ſhall be intended to make a Grant good, unleſs the contrary doth appear. 2 *Cro.* 679. He need not plead, that it was appendant at the Time of the Grant to the Earl; *Conceſſit* is enough: And that tho' in general Words. 35 *H.* 8. *Bro. Pleading*, 143. *Kelway* 43. 1 *Roll's Abridg.* 405.

What Miſrecital or Miſtake ſhall avoid a Grant of the King, or not.

Then ſuppoſe it did appear, that this Advowſon was not appendant in the 13th *Eliz.* yet it doth paſs: There is but one ſuppoſed Falſity, and that is Dr. *Wilſon*'s Preſentation by Lapſe, which is admitted to be *pleno jure*; Firſt, The Grant is full, expreſs, and large enough, *Know ye therefore, &c. All our Right, &c.* as full Words as can be uſed, without any Reſtriction whatſoever. And as to the Suggeſtions, there's not any Miſtake in them: 'Tis not ſuggeſted that 'twas ever appendant; not ſuggeſted that it did paſs by thoſe Letters Patent; nor that it came to *Th.* but only that he claimed it; and the Word *Claim* doth not always import a lawful Claim;

for a Man is amerciable *pro falso clamore*. Here's as much Caution and Care in the penning of these Letters Patent as was possible: Nothing but what is exact.

Suppose a Man doth claim an Advowson by a void Grant, and he brings a Writ, after the King hath presented; and the King says, *Let my Clerk have it quietly for his Life, and you shall have a Grant from me, and shall be secure of all my Right for the future.* 'Tis not said, that 'twas Sir *William*'s Presentation: But he sued a Writ so describing it.

'Tis admitted by *Car.* 1. that this Patent might be void, yet it was his Intention that *Th.* should have it for the future: This Intent is as plain as Words can make it; that he and his Heirs should for ever enjoy it, notwithstanding any Defect in the Patent of Q. *Eliz.* 'Tis not only to restore an old Title, and make Reparation for the Wrong done by the King's Presentation, but in Case the old Title were Defective, to make and give to him a good one: If it appears that the King's Intention were for passing it, it shall pass, notwithstanding a Mis-recital.

Suppose the Grant had been recited at Large, and no more had been said but the King confirms it, would not that have been good? Then was cited the Earl of *Cumberland*'s Case, 8 *Rep.* 166. the Word therefore is in that Case too; yet because full Words are superadded, it shall not be qualified by the Deed recited, and that is a much stronger Case than this: *Hill.* 22 & 23 *Car.* 2. Sir *Robert Atkins* versus *Holton*, 'tis *in Ventris*. And the Pleading in *Vidian*'s *Ent'* agreed that King *John*'s Patent was void, and King *Edw.* must have been deceived in his Grant, and his Intention might be there said to be only to make a Restitution. And a false Inquisition turns a Man as much out of Possession of a Franchise, as the King's Presentation doth out of a Patronage; but held there, that tho' King *John*'s Grant was void, yet that of *Edw.* was good: Because the Words were full and general, and the King shewed his Intent that the Party should have the Thing. But the other Side have objected, That this is a qualified Intention according to the Tenor of the first Patent. To which it was answer'd, That the King did suppose that Patent to be Defective, and his true Intent was, that *Th.* should have the Advowson. Besides, tho' it were in Gross, yet it might have the Reputation of being Appendant, and it was the King's Meaning to pass it, 6 *Rep.* 63. a small Matter will make a Reputation of an Appendancy. If a Man mortgages his Manor, excepting the Advowson thereto belonging, 'tis become in Gross; but when the Condition is performed, and the Deed avoided, 'tis Appendant again: Therefore it might be thought Appendant; it might be some Accident, which did sever it from the Manor; yet if it had the Reputation of being so, it might be within the King's Intent to pass it, tho' it did not pass by the first: 'Twas intended that some Advowson should pass, and here are express Words to pass this. In *Coke*'s *Entries* --- *Quare Impedit*, it appears that this Advowson of *Bedall* was Appendant.

It further appears by History, That this *Simon Digby* had committed

mitted Treaſon, before the Church was void; and before Attainder the Queen preſented, that made it in Groſs: Then the Attainder makes it appendant again. Then, tho' it might be poſſible that the Queen was ſeized in Groſs, yet if it were ſo, upon *Digby*'s Attainder ſhe was ſeized of it as Appendant: Now, if any Thing might make it Appendant, 'twill be hard to conſtrue it void, where, for any Thing that doth appear, it might be good. Such Declarations ſo ſubtle may enſnare any Defendant, and take away any Man's Inheritance. The Attorney ſhould have taken Iſſue upon the Traverſe, and that would have brought the whole Matter in Queſtion.

As to the Miſtake about *Wilſon*'s Preſentation, that cannot vitiate againſt an expreſs Intent: The King's Deſign was to determine the Difference between his Incumbent and another; he would not have his Right in this Benefice to be queſtioned or diſputed; for otherwiſe, there was no Reaſon for *Th.* to take a Grant to avoid Controverſy, and yet that new Grant to leave him in as bad or worſe Condition. Here's both Confirmation and Grant; and if ſo, what matters it, whether *Wilſon* were preſented one way or the other? *Th.* could not have been in a worſe Condition, if he had miſcarried in his Writ. The King deſigned to him all the Right which he had, and otherwiſe he was at the Charge of procuring Letters Patent, to no other Purpoſe than to be deceived. Beſides, here was a good Conſideration, tho' *Th.* had no Right: A Surrender of void Letters Patent is a good Conſideration: 1 *Rep.* 143. *Altonwood*'s Caſe, and 5 *Rep.* 65. Lord *Chandos*'s Caſe; the King there thought himſelf ſeized by Virtue of the Surrender, which he was not, yet held good; ſo that 'tis not every Miſtake that will avoid a Grant, when the Intention appears. 1 *Roll's Rep.* 23. Therefore, if there may be any Thing given in Evidence, which might ſupport theſe Letters Patent, they ſhall not be adjudged void upon *Oyer*. And to make theſe void of *Car.* 1. they muſt conſtrue thoſe of the Queen void; and theſe cannot be adjudged void, becauſe they are not before the Court. Letters Patent recited were never adjudged illegal; for, notwithſtanding this Recital, there might be more Words in them, which might make them good: 'Tis *inter alia*. Suppoſe it had been *ſpectant'* or *exiſtent'* in *Bedall*, that would have paſſed the Advowſon in Groſs. 'Tis not inconſiſtent with any Thing ſaid in this Patent of *Car.* 1. to ſay that the other of Queen *Elizabeth* contained or paſſed more, *Mod. Rep.* 194, 195. *Hardres* 231. the *igitur* is only *nota continuationis*, and doth not always ſuppoſe all that's precedent to be the Conſideration; it can't well begin a Deed, and that is all; 'tis *Ex uberiori gratia, &c.* 3 *Leon.* 249. 'Tis impoſſible to ſuppoſe or uſe more comprehenſive Words than in this Caſe, and therefore it was inferred that theſe Letters Patent of *Car.* 1. were good.

Then it was argued further with the Plaintiff in the Writ of Error, that in this Caſe Mr. *Attorney* can take no Advantage of either of theſe Miſtakes in the Defendant's Plea, if they are ſuch; for that 'tis only Matter of Inducement; and the Letters Patent needed not have been pleaded with a *Profert hic in curia*, and therefore cannot hurt: If the Inducement be good to maintain the Traverſe

Inducement to maintain the Traverſe ſufficient in pleading.

or

or make it material, that's enough; but ſtill the Inducement is not traverſable. 'Tis true, that generally ſpeaking, a Deed or Grant after *Oyer* becomes Part of the Plea: But ſtill 'tis only Inducement. If a Defendant confeſſes and avoids, the Plaintiff ſhall not depend upon that which he confeſſes, but anſwer that whereby he avoids the Plaintiff's Title or Charge. This is no more than if they had traverſed the Grant, which they could not do. In the Caſe of a common Perſon, ſuppoſe the Defendant's Title not full, yet if he traverſes the Plaintiff's, that's enough. Form requires an Inducement to a Traverſe, but the latter is only material for the Plaintiff to anſwer to; for nothing can be traverſed, but what is material. Now, why ſhould it not have been a good Anſwer to their Declaration, to have ſaid that *Car.* 2. preſented by Lapſe, *abſque hoc*, that *Car.* 1. died ſeized? For by this the Seiſin or Preſentation of *Car.* 2. had been avoided; and there's nothing elſe material in the Declaration: For the Seiſin of Queen *Elizabeth* and *Jac.* 1. are not to the Purpoſe. And if anſwered by the Defendant, it muſt have been againſt him; there had been a good Title for the King without it: Then ſuppoſing it neceſſary to ſhew how it came out of *Car.* 1. the Attorney General can only take Iſſue on the Traverſe of his dying ſeized; for that denies the whole Title that is material to be anſwered to: Now, whatſoever ſhews that the Plaintiff hath no Right to the Thing in Demand, is a good Plea, let who will have the true Right. The true Title upon this Declaration is, that *Car.* 1. preſented, and thereby became ſeized, and died ſeized; and the denying him to die ſeized, is a Denial of this Title; for if K. *Car.* 2. did preſent by Lapſe, and K. *Car.* 1. did not die ſeized, 'tis with the Defendant. No Man is bound to anſwer that, which if he do, it will ſtill be againſt him; but if a Man makes ſuch an anſwer, as if true, the preſent Plaintiff hath no Title, 'tis enough: Then if it be true that no Right deſcended from *Car.* 1. to *Car.* 2. and that *Car.* 2. preſented only by Lapſe, what Right can his preſent Majeſty have? And all this is confeſſed by the Demurrer, if well pleaded. And 'tis no Objection to ſay, that the dying ſeized ought not to be traverſed, but only the Preſentation; for that is a Miſtake. In caſe of Land 'tis good. And an Advowſon is an Inheritance deſcendible in like Manner, and Mr. *Attorney* thinks it a good Traverſe; for he all along in his Declaration alledges a dying ſeized from Queen *Elizabeth* downward: And there are ſeveral Precedents thus, *Winch*'s *Ent.* 661, 662, and *Winch* 912, 686, 692, and *Buckler* and *Symonds*, *Winch* 911, 912, is of an Advowſon in Groſs; and in the ſame Book 35, 59, are thus. A Man may die ſeized of an Advowſon, as well as of Land; and if he doth not die ſeized, it doth not deſcend, and the Seiſin in Groſs is not to be traverſed, as is 1 *Anderſon* 269, and *Hob.* 102.

What to be traverſed.

Then 'twas ſaid, that the true Reaſon and Nature of a material good Traverſe is well explained in *Vaughan*'s firſt Caſe of *Tufton* and Sir *Rich. Temple*, and 1 *Saund.* 21, 22; and it is this, eſpecially in a *Quare Impedit*: If any Thing in the Count be travers'd, it muſt be ſuch Part, as if true, is inconſiſtent with the Defendant's Title;

In a *Quare Impedit* eſpecially.

and if falſe, or found againſt the Plaintiff, doth abſolutely deſtroy his Title: Nay, if the Traverſe leaves no Title in the Plaintiff, then 'tis good, whatſoever comes of the Defendant's. Then the Difficulty is, If the King by his Prerogative may waive his own Title which is traverſed, and inſiſt upon the Deficiency of that which the Defendant alledges? And in the Caſe of the King and the Biſhop of *Worceſter*, and *Jervis*, in *Vaughan* 53. there 'tis ſaid, That the King ought to maintain his own, and not to queſtion the Defendant's: He cannot deſert that which he hath alledged for himſelf, and fall upon the Defendant's Title: And Reaſon warrants ſuch Rule: For, (tho' the King hath no Damages in a *Quare Impedit*, notwithſtanding his laying it *ad dampnum*, *Hob.* 23. yet) the Suit ſuppoſes an Hindrance and Damage to the King: And if the Right be not his, he hath no Cauſe to complain of the Defendant; tho' another hath. Every Man is to recover by his own Strength, and not by the Weakneſs of the Defendant's Pretenſions: And if the Law be thus, then how can Mr. Attorney General take Advantage of this upon Demurrer after *Oyer*? For, now upon *Oyer*, 'tis, as they ſay, become Part of the Defendant's Plea, and conſequently it muſt be Part of the Inducement: And if ſo, he ought in that Caſe to have taken Iſſue upon the Traverſe, which denied his Maſter's Title. Wherefore, upon the whole Matter, it was prayed, That the Judgment ſhould be reverſed.

Argument for the Defendant in Error.

On the other Side, 'twas argued for the King, That this Judgment ought to ſtand, and as to the laſt Point, 'twas ſaid, That taking it for granted, the King could not traverſe any Point of the Defendant's Plea; yet certainly he might demur upon the whole, in caſe it were inſufficient; That now *Oyer* was craved, and had, the Deed did become Part of the Defendant's Plea, and muſt be taken as ſuch; That tho' there had been no need of a *Profert*, yet when 'tis produced, 'tis ſuch as he hath pleaded, and upon the whole, the Court is to judge, there being a Demurrer; That as the Caſe ſtood, the King might take Advantage of both the Exceptions; That the Declaration of it ſelf was good, and if the Plea be nought, the King ought to have Judgment for him; That every Plea is to be taken moſt ſtrongly againſt the Party that pleads it; That here the Defendant had admitted K. *Car.* 1. well ſeized, that he ought to ſhew it out of him, otherwiſe the Plea was ill; that every Traverſe muſt have an Inducement; That if upon the whole Plea it did not appear that King *Car.* 1. parted with this Advowſon, 'tis naught; that if by the Party's own ſhewing it was manifeſt to the Court, That the King continued ſeized, and what he doth further ſhew, no ways contradicts it, he could not traverſe the Dying ſeized, and therefore a Demurrer was moſt proper; and conſequently, upon this Demurrer, they were let in to affirm, that nothing paſſed from the King by theſe Letters Patent of *Car.* 1.

Then it was argued, That this Grant was void, becauſe it was to a Perſon then Eſq; that *Tunc Armigero* can have Reference

Anſwer to the Argument as to the Addition.

only to the Time of the Letters Patent; that a Man cannot be a Knight and an Eſq; at the ſame time; that Knight is Part of his Name, and the Title of Eſq; is drowned in that of Knight; that the old Books are thus. 7 *H.* 4. 7. 14 *H.* 6. 15. 21 *E.* 4. 72. 2 *Inſt.* 594, 666. *Hutt.* 41. *Bro.* tit. *Noſme*, 33. 1 *Cro.* 372. That 'tis true, if a Deed of Feoffment be made to a Man by a wrong Name, and Livery be thereupon had, 'tis good: But all the Books make a Difference between that Caſe, and where it is by Deed, where the Operation is altogether by Deed. Then was cited the Earl of *Pembroke*'s Caſe, in *Littleton*'s *Rep.* 181. and in *Jones* 215, 223. the Court went upon the Reaſon, that the Jury found him to be the ſame Perſon. *Latch* 161. There they would intend him an Eſq; at the Time of the Commiſſion, and a Knight at the Time of the Return: And it was for Neceſſity-ſake, to prevent the Avoiding of ſo many Trials, as had been upon that Commiſſion.

Lord *Ewre*'s Caſe, 2 *Cro.* 240. there 'twas held well enough, becauſe ſufficiently deſcribed: So in a Grant, if it cannot be intended otherwiſe than to the ſame Perſon, there 'tis well enough; but here they can never be the ſame. In caſe of an Earl or Biſhop, there 'tis underſtood, who is meant by the Deſcription; there can be but one of that Title: But here the Plea ſaith, That he was not a Knight at the Time. And Sir *Thomas Ormond* was attainted by the Name of *Thomas Ormond*, Eſq; and ill for that Reaſon, 2 *Roll's Abr.* 43, 198. *Dyer* 150. 1 *Leon.* 159, 160. the higheſt and loweſt Dignity are univerſal, and the ſame in every Kingdom. 7 *Rep.* 16, 20 *E.* 4. 6. Can any Body ſay upon this Grant, That the King intended to paſs this Advowſon to a Man, that then was only an Eſq; ? *Selden* 682. the Addition of Eſq; is drowned and merged in that of Knight, and *Selden* was a very competent and good Judge of this Matter. Then 'twas ſaid, that the only way to ſalve this, which had not been urged for the Plaintiff, was, that he might be reputed a Knight, and a Name of Reputation will be ſufficient to take by. And to this it was anſwered, That he who is reputed a Kt. and is none, cannot take by that Name: And beſides, if he could, it ſhould have been pleaded by a *per Nomen*. In caſe of a Baſtard, the Reputative Name muſt be ſhewn to make the Grant good. The Degree of Knight was formerly of Eſteem in the Law, as upon a Writ of Right, if the Miſe be joined; and if a Peer be Party to any Iſſue at Law, triable by Jury, *&c.* As to the Objection, that a Grant to one by a Name of Dignity, which he really had not, *viz.* The Eldeſt Son of a Duke, as a Marqueſs, and that a Grant to him by that Name is good: 'Twas anſwered, That there was a real Reputation, he takes place after all real Marqueſſes as a Marqueſs by the Rules of Heraldry. There's a Ground for it, from the Precedency given him by the common Uſe and Cuſtom of the Realm; and they are named ſo now-a-days in Deeds: But anciently Conveyancers were more Cautious, and named them Eſquires commonly called Marqueſſes: And even now, careful Men call

them Eldeſt Sons of ſuch Dukes, *&c.* If a Reputation would have done it, the Pleading ſhould have been with a *Cognit' & Reputat' per Nomen.* It is the Name which intitles the Grantees to take, and otherwiſe they have no Pretence to claim by ſuch Letters Patent, no more than *John* or *Thomas Theckſton.* And if the Perſon hath any other Name of Reputation, that ought to be ſhewn; wherefore it was hoped, That this was Cauſe enough to affirm the Judgment.

That the Miſtake in the Grant fatal.

Then it was argued, That this Grant was void as a Grant of an Advowſon appendant, when upon the Record it appeared to be an Advowſon in Groſs; that the Defendant had admitted it an Advowſon in Groſs in Queen *Elizabeth*; that he hath not only admitted, but confeſs'd it in almoſt direct Terms, by ſaying, *Bene & Verum eſt*, that *Car.* 1. became and was ſeized in manner as in the Declaration: This is a full Confeſſion, that the Queen was ſeized in Groſs. 'Twas ſaid to come to that King by Deſcent, and ſo there is no Room left for Preſumption or Intendment, that it was by any wrongful or other Seiſin. Then 'twas urged, That nothing paſſed to the Earl of *Warwick*; becauſe not Appendant, but in Groſs. And for this was cited *Moor* 45. *Hob.* 322, 323. and other Books: So that it doth not appear, that the King did intend to paſs this Advowſon; for, in the Grant to the Earl of *Warwick*, there's no Grant of it by any expreſs Name; which it is probable would have been, had the ſame been intended: Now, to ſuppoſe it Appendant, is to ſuppoſe againſt the Record, againſt both the Averment in the Count, and the Confeſſion in the Plea. 'Tis in general Words, *una cum Advocationibus, &c.* nor does it paſs by the Letters Patent of *Car.* 1. becauſe it did not paſs to the Earl, by thoſe of Queen *Eliz.* this Grant is uſhered in after all the Recitals, and thoſe ſuppoſe the Advowſon to have paſſed by the firſt *Igitur*; wherefore it muſt be upon Conſideration of what is before alledged. This is at leaſt an illative Word, and cannot begin an independent Subſtantive Clauſe of it ſelf: So is *Ulterius*, 2 *Brow.* 132. If this Granting Part ſhould be taken to be Subſtantive, and to have no Reference to what is precedent, all thoſe Recitals would be vain and inſignificant; and the King might as well have begun with the Words of the Grant. The King's Grants are to be taken according to his Intentions; and thoſe are to be expounded by the Recitals. Then were quoted many Caſes, as 5 *Rep.* 93. *Hob.* 120, 203. *Hutt.* 7. 2 *Roll's Abr.* 189. 11 *Rep.* 93. and it was ſaid, That here are many falſe Recitals. Sir *Will. Theckſton* claims, that muſt be intended a lawful Claim, whereas he could not lawfully challenge any Right to this Advowſon; That the King preſented *Wilſon* by lapſe; the King was deceived in thinking that this paſſed to the Earl; the Agreement between Dr. *Wickham* and Sir *W. Theckſton*, was only to deceive the King. Here's no Notice taken of the Advowſon's being in Groſs; the Quality and Nature of the Advowſon is totally concealed from the King; the Words *notwithſtanding any Defect* help only want of Form.

Here

King deceived in his Grant.

Here was a plain Artifice in the Matter. In Queen *Elizabeth*'s Grant, it was Advowſons in General, *&c.* but when *Car.* 1. is to confirm that Grant, 'tis of that Church by Name. All the intermediate Recitals between that of the firſt Grant and the Words of this new Grant, are dependent on that firſt. The King's Intention, That *Theckſton* ſhould have it, is not abſolutely, but *ſecund' Tenorem & Intentionem* of the former Patent; the King meant only to reſtore to him his old Right which he had by that Patent, notwithſtanding the Preſentations. 10 *Rep.* 110. All Facts recited in the King's Grant ſhall be intended to be of the Suggeſtion of the Patentee. If there be ſeveral Conſiderations, and one falſe, and the King deceived thereby, it ſhall vitiate the Grant. 3 *Leon.* 249. *Voer*'s Caſe cited in *Legate*'s Caſe; *Fitz.* Tit. *Grant*, 58. 3 *Leon.* 119. If the Granting Words had ſtood alone, the Caſe had been more doubtful: But here they are all coupled. In all the King's Grants there muſt be ſome Conſiderations for his Favour: And Abundance of Caſes were quoted concerning the King's Grants, Miſrecitals, falſe Recitals, and Deceit, *&c.* Then it was ſtrenuouſly inſiſted upon, That the Recitals and the Granting Clauſe muſt be conſidered and judged of together; that the contrary Opinion, is to make the Granting Part to be without any Conſideration; 'tis to have a Concluſion without Premiſſes, *an igitur* without a Cauſe; That *eadem ſervitia* can never be intended new ones; That *ſecundum tenorem* muſt refer to the Appendant Advowſon, and therefore the Advowſon in Groſs here declared upon and pleaded to, can never paſs by this Grant; and upon the whole it was prayed, That the Judgment might be affirmed.

Reply for the Plaintiff in Error.

It was replied, on Behalf of the Plaintiff in Error, That as to the Variance in the Title of Knight, no Anſwer had been given to the reaſonable Diſtinction between the Caſe of Grants and that of Writs and Indictments; That here was no Proof or Appearance of a Diverſity of Perſons; That as to the Grant it ſelf, *ſecund' tenorem* could mean only a Reference to the Intereſt or Eſtate granted by them; not to the Thing or the Nature of it; That ſuch Words ſignified only, as fully and largely; they had no expreſs Relation to the Quality of the Advowſon, whether in Groſs or Appendant; That by ſuch Niceties, any or moſt Patents might be avoided; That Grants of Honours as well as of Intereſts, if queſtioned, muſt be under the ſame Rule; and the Conſiderations, upon which they are grounded, may be ſubject to Inquiry, if true or falſe, *&c.* That the Patent of it ſelf, without Reference to the Pleading, was good; that the Judgment deſired, was to condemn a Patent as void, becauſe another Patent recited in it was ſo, which perhaps was not fully recited; and if it were, was not in Judgment before the Court; and the Subſtance of what was urged before, was in ſhort repeated; and prayed, That the Judgment might be revers'd. And it was accordingly revers'd; and Mr. *Pierſe* (*Scroop* being dead) preſented *Francis Pemberton* his Clerk, who was admitted, inſtituted and inducted, *&c.*

Judgment reverſed.

1 *FINIS.*

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